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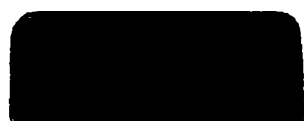
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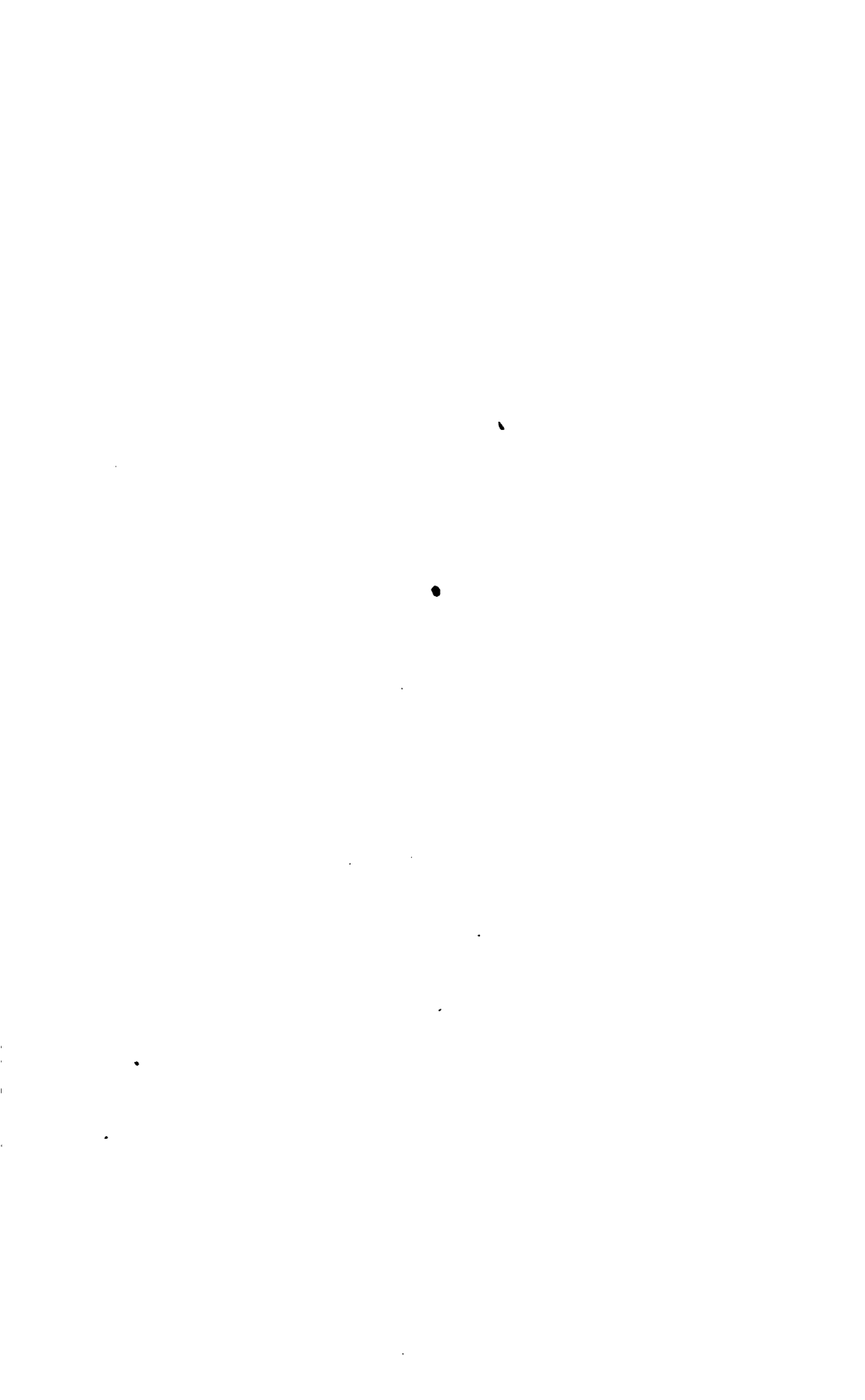
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CASES

HEARD AND DETERMINED BY

At Brit. Parliament,
//

THE HOUSE OF LORDS,

OR

APPEALS FROM THE COURTS OF EQUITY,

AND ON

WRITS OF ERROR IN ENGLAND AND
IRELAND;

AND

QUESTIONS OF PEERAGE.

1839, 1840, & 1841.

REPORTED BY

MARTIN JOHN WEST, Esq.
OF LINCOLN'S INN, BARRISTER AT LAW.

By Appointment of the House of Lords.

VOLUME I.

LONDON:

SAUNDERS & BENNIN^W LAW BOOKSELLERS,
43, FLEET STREET.

1842.

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LONDON :
Printed by A. SPOTTISWOODE,
New-Street-Square.

LORD COTTENHAM,
LORD HIGH CHANCELLOR OF GREAT BRITAIN.

LORD LANGDALE, .
MASTER OF THE ROLLS.

SIR LANCELOT SHADWELL,
VICE CHANCELLOR.

IRELAND.

LORD PLUNKETT, LORD CHANCELLOR.

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CASES
 UPON
APPEALS AND WRITS OF ERROR
 FROM
 THE COURTS OF ENGLAND AND IRELAND,
 AND
Questions of Peerage,
 DETERMINED BY THE HOUSE OF LORDS
 In 1839 and 1840.

[15th August 1839.]

BARONY OF BRAYE.*

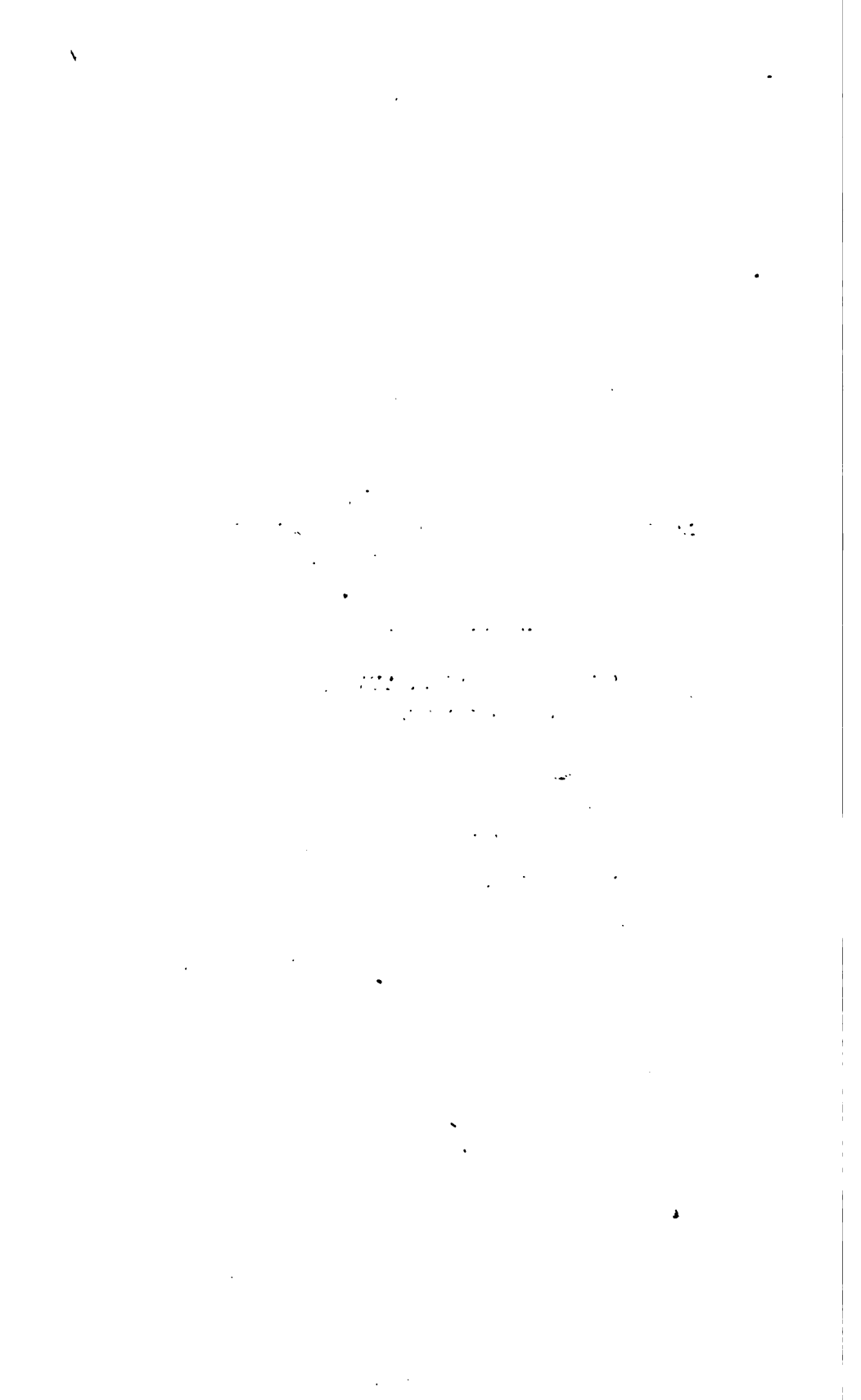
SIR HARRIS NICHOLAS and MR. LEWIS for MRS. SARAH
 OTWAY CASE, Claimant.

DR. LUSHINGTON and MR. DEEDS for SIR PERCEVAL
 HART DRYE, Claimant.

THE ATTORNEY GENERAL for the CROWN.

Evidence of Title to Peerage.—Writ of Summons.—Sitting in Parliament.—There is no settled rule in questions of peerage, that where it is proved after a careful search of all the repositories in which a patent of peerage would have been likely to have been found, that there is no trace of any patent, the writ of summons and sitting in Parliament by the individual under a name

* The Register was inserted with this case in the *London Evening Chronicle* by Mr. Robinson.



CASES
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The ATTORNEY GENERAL for the CROWN.

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* The Reporter was favoured with this and the following Peerage Case by Mr. Robinson.

be evidence of the title to the peerage descending to the heirs of the body, including females.

Attainder of Co-heir during Abeyance of Peerage—Forfeiture of Dignity by Descendants.—During the abeyance of a barony descendible to the heirs of the body, one of the co-heirs is attainted for treason; an Act of Parliament is afterwards passed for the restoration in blood of the children of such co-heir: Held (after consulting the judges) that the previous attainder of the co-heir did not effect a forfeiture of the abeyant barony, and that the Crown may determine the abeyance in favour of the descendant of such attainted co-heir.

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THE petition of Mrs. Sarah Otway Cave of Stanford Hall in the county of Leicester, widow, to His late Majesty, praying that His Majesty would be graciously pleased to determine the abeyance of the barony of Braye in her favour, by His Majesty's letters patent, or in such other manner as to His Majesty might seem proper, together with His Majesty's reference thereof to this House, and a report by the Attorney General thereon annexed; and also the petition of Sir Perceval Hart Dyke of Lullingston Castle in the county of Kent, Baronet, praying that His Majesty would be pleased to determine the abeyance of the said barony in his favour, by directing a writ of summons to him to attend His Majesty in parliament by the style and title of Baron Braye; were severally referred to the Committee for Privileges.

The result of the evidence adduced was, that it appeared to the committee that Mrs. Otway Cave had proved her descent from Elizabeth, the second daughter of Edmund Lord Braye, who appears to have sat in parliament in the reign of Henry the Eighth; and that the other claimant, Sir P. H. Dyke, appears also to

have made out his pedigree as descended from Frideswide, the third daughter and fourth child of that Edmund Lord Braye.

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In the course of the investigation two questions of law occurred; one of these was held to have been settled by former cases,—as stated by their Lordships in their opinions *postea*; that is, that evidence of a sitting in this House under summons by writ, where it has been proved, on careful examination of all the depositories where a patent would have been likely to be found, that there is no trace of any patent, the summons, and a sitting under it, shall be evidence of the title to the peerage descending to the heirs of the body, including females.

The other question raised by the Attorney General, and which was argued in presence of the judges, was this:—During the abeyance of this barony, descendible to the heirs of the body, one of the co-heirs was attainted for treason; an act of parliament was afterwards passed for the restoration in blood of the sons and daughters of the party attainted. Suppose A. claims the dignity through the co-heir who was so attainted, and B. claims through another co-heir, whether it is competent to the Crown to determine the abeyance in favour of A.; and, whether it is competent to the Crown to determine the abeyance in favour of B.

The arguments adduced, as well as the grounds on which the judges answered the questions in the affirmative, will be found in the following opinion delivered by the Lord Chief Justice Tindal:—

“ During the abeyance of a barony descendible to
“ heirs of the body one of the co-heirs was attainted for

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“ treason; an act of parliament afterwards passed in
“ the following terms:

“ “ An act to restore in blood the sons and daugh-
“ “ ters of Edward Lewknor, Esquire. Anno
“ “ Primo Elizabeth, N^o 32.

“ “ In most humble and lamentable wise shewen
“ “ unto yo^r Heighness yo^r faithfull and most obedient
“ “ subiects Edward Lewkno^r, Thomas Lewkno^r, Steven
“ “ Lewkno^r, and William Lewkno^r, Jane Lewkno^r,
“ “ Maria Lewkno^r, Elizabethe Lewkno^r, Anne Lewk-
“ “ no^r, Dorathie Lewkno^r, and Lucrecie Lewkno^r,
“ “ sonnes and daughters to Edwarde Lewkno^r, late of
“ “ Kyngeston Bowsey in the countie of Sussex, Esquier,
“ “ that where the said Edwarde Lewkno^r their father,
“ “ in the time of yo^r Heighness syster the Quene’s
“ “ Ma^{tie} that deade is, was attaynted of heighe treason,
“ “ and by reason thereof yo^r saide subiects and every
“ “ of them standen and be parsons in their linage and
“ “ blood corrupted, whereby they and every of them
“ “ be not only deprived of all manor degrees, states,
“ “ names, fames, and of all inheritance that shoulde or
“ “ might have come vnto them or any of them from
“ “ or by their saide father, if the same their late father
“ “ had not been attaynted, but also of all and singular
“ “ other inheritance that shoulde or mighte by possi-
“ “ bilitie have come vnto yo^r saide subiectes by any
“ “ other their collaterall auncestor or auncestors of the
“ “ parte of their saide father, to whome they or any
“ “ of them shoulde or mighte have cōveyed or may
“ “ cōveye themselves as nexte cousen and heyer of
“ “ blood by meane degrees by their saide father, whereby
“ “ yo^r saide subiectes as now reste out of all name and
“ “ reputation to their greate discomforte and daylie

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‘ sorrowes: And forasmuche as yo^r saide subiectes be
 “ ‘ and alwayes have been to yo^r Heighnes trewe and
 “ ‘ faithfull subiectes, it may therefore please yo^r Heigh-
 “ ‘ nes of yo^r most noble and habundance grace, and
 “ ‘ for the trewe and faithfull service w^{ch} yo^r said
 “ ‘ subiectes intend to dve to yo^r Ma^{tie}, and yo^r heyres
 “ ‘ and successores, during their lives, that it may be at
 “ ‘ the humble sute and petiçon of yo^r saide subiectes
 “ ‘ ordeyned, established, and enacted by yo^r Heighnes,
 “ ‘ w^t the assent of the lords spirituall and temporall,
 “ ‘ and of the comens, in this presente parlyament
 “ ‘ assembled, and by authoritie of the same, that yo^r
 “ ‘ saide subiectes Edward Lewkno^r Thomas Lewkno^r,
 “ ‘ Steven Lewkno^r, Wylliam Lewkno^r, Jane Lewkno^r,
 “ ‘ Mary Lewkno^r, Elizabethe Lewkno^r, Anne Lewk-
 “ ‘ no^r, Dorathie Lewkno^r, and Lucrecie Lewkno^r,
 “ ‘ and every of them, and their heyres, and the heyres
 “ ‘ of every of them, from henceforth may and shall be
 “ ‘ by the authoritie of this acte restored and enhabled
 “ ‘ only in blood and lynage as heyre and heyres to
 “ ‘ the said Edward Lewkno^r their fater, in suche the
 “ ‘ same and like maner, fourme, degree, and condiçon,
 “ ‘ to all intents, cōstrucçons, and purposes, as they or
 “ ‘ any of them, their heyres or the heyres of any of
 “ ‘ them, mighte or shoulde have been if the said Edward
 “ ‘ Lewkno^r their fater had not been attaynted; and
 “ ‘ also that yo^r saide subiectes Edward, Thomas,
 “ ‘ Steven, Wiffm, Jane, Mary, Elizabethe, Anne,
 “ ‘ Dorathie, and Lucrecie, and every of them, and
 “ ‘ their heyres, and the heyres of every of them, from
 “ ‘ henceforthe may and shall be enhabled to demaunde
 “ ‘ as to have, hold, and enjoy all suche lands, ten^{ts},
 “ ‘ and hereditaments, w^t their apptenances, which at

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“ ‘ anye tyme hereafter shall descende, come, remayne,
 “ ‘ or reverte from any of theire collaterall or lyneall
 “ ‘ auncestors of the parte of the saide Edward Lewk-
 “ ‘ no’ their late father, other than suche castells.
 “ ‘ mannors, lands, ten^{ts}, rents, reverçons, remaynders,
 “ ‘ serviçs, possessions, and other hereditaments w^{ch}
 “ ‘ were the saide late Edward Lewkno’ their saide father,
 “ ‘ in vse, possession, reverçon, or otherwise, the day of
 “ ‘ the attaynder of the saide Edward Lewkno’, or the
 “ ‘ day of the saide treason by him cōmitted, and other
 “ ‘ than such castells, honors, mannors, lands, teñ, and
 “ ‘ other hereditaments as yo’ Heighness sister Queene
 “ ‘ Mary or yo’ Heighness was or is entitled to have or
 “ ‘ mighte or oughte to have by force of the saide at-
 “ ‘ tayndor, or by reason of any office founde or to be
 “ ‘ founde after the saide attayndor, in such and like
 “ ‘ manner, fourme, and condiçon, to all intents, cōstruc-
 “ ‘ çons, and purposes, as if the saide Edward Lewkno’,
 “ ‘ late father to your saide subiectes, had never been
 “ ‘ attaynted, and as thoughe no such attayndo’ of the
 “ ‘ saide Edward Lewknor had been had or made; and
 “ ‘ that yo’ said subiectes Edwarde Lewkno’, Thomas
 “ ‘ Lewkno’ Steven Lewkno’, and Wiłłm Lewkno’,
 “ ‘ Jane Lewkno’, Mary Lewkno’, Elizabethe Lewkno’,
 “ ‘ Anne Lewkno’, Dorathie Lewkno’, and Lucrecie
 “ ‘ Lewkno’, and every of them, and their heyres and
 “ ‘ the heyres of every of them, may hereafter vse and
 “ ‘ have any acçon or sute, and make his or their
 “ ‘ pedegrees and conveyance in blood, lynage, and
 “ ‘ degree as heyres, or heyres only as well to and from
 “ ‘ the saide Edwarde Lewkno’ their father as alš to and
 “ ‘ from any other parson and parsons, in like manner,
 “ ‘ fourme, condiçon, and degree, to all intents, con-

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“ ‘ strucçons, and purposes as if the said Edward
 “ ‘ Lewkno^r their saide late father had never been at-
 “ ‘ taynted, and as if no such attayndor were or had
 “ ‘ been hadd; the corrupcion of blood betweene the
 “ ‘ saide Edward Lewkno^r and yo^r saide subiectes and
 “ ‘ their heyres, or any acte of parliamente or judgment
 “ ‘ at the comon lawe concernynge the attayndo^r of the
 “ ‘ said Edward Lewkno^r, or any other thinge wherebye
 “ ‘ the blood of the saide Edward Lewkno^r is or shoulde
 “ ‘ bee corrupted, to the contrary in any wise not
 “ ‘ w^tstandinge: Provided alwayes, and be it enacted
 “ ‘ by th^eauthorite aforesaide, that this presente acte,
 “ ‘ or any thinge therein conteyned, shall not extende
 “ ‘ to enhable, restore, or entitle yo^r saide subiectes, or
 “ ‘ any of them, or any of their heyres, to any honours,
 “ ‘ castells, mannors, lordeshippes, lands, teñts, and
 “ ‘ other hereditaments w^{ch} yo^r Heighness now hathe or
 “ ‘ had, or is, mighte, or oughte to be entitled to have
 “ ‘ by reason of any attayndor or attayndors of the
 “ ‘ same Edward Lewkno^r, or otherwise, nor to any
 “ ‘ castells, honnors, mannors, lordeshippes, lands,
 “ ‘ teñts, rents, reverçons, serviçs, and other heredita-
 “ ‘ ments, late of the saide Edward Lewkno^r, w^{ch} yo^r
 “ ‘ Ma^{ty} sister the late Quene Mary was entitled to
 “ ‘ haue by reason or force of the saide attaindo^r or
 “ ‘ otherwise, savinge to yo^r Heighnes, yo^r heyres and
 “ ‘ successores, and to all and euery other parson (and
 “ ‘ parsons, bodyes politique, corporate, their heyres
 “ ‘ and successors, and to the heieres and successors of
 “ ‘ euery of them, all such estate, possession, righte,
 “ ‘ title, interest, reverçon, remainder, entrie, lease
 “ ‘ and leases, clayme, cōdiçon, tearme of years, rents,
 “ ‘ and all other profitts and commodities whatsoever

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“ ‘ as yo^r Heighness or any of them haue in or to any
 “ ‘ honnors, castells, mannors, lands, teñts, rents, pro-
 “ ‘ fits, and hereditaments, in such manner, fourme,
 “ ‘ and condiçon, to all intents and purposes, as thoughe
 “ ‘ this acte had neuer been had or made: Provided
 “ ‘ alwise, that this acte, ne any thinge therein con-
 “ ‘ teyned, extende ne be preiudiciall to yo^r saide
 “ ‘ moste humble subiectes or any of them, theire heyers
 “ ‘ or assignes, or the heyers or assignes of any of them;
 “ ‘ for or concerning any mannors, lands, teñts, or
 “ ‘ other hereditaments w^{ch} yo^r saide subiectes or any
 “ ‘ of them haue or hathe by any good, lawfull, and
 “ ‘ perfecte feoffment, gifts, and assurance or other
 “ ‘ conveyance to them or any of them had or made by
 “ ‘ any of their lyneall or collaterall ancestors, or by
 “ ‘ any other parson or parsons.’ ”

“ A. claims through the co-heir who was so attainted.

“ B. claims through another co-heir.

“ First. Is it competent for the Crown to deter-
 “ mine the abeyance in favour of A. ?

“ Secondly. Is it competent for the Crown to
 “ determine the abeyance in favour of B. ? ”

The judges requested time to consider these ques-
 tions.

The Lord Chief Justice of the Court of Common
 Pleas delivered the unanimous opinions of the judges,
 in the words following; videlicet,

“ My Lords, in the questions proposed by your
 “ Lordships House to Her Majesty’s judges, it is first
 “ supposed that during the abeyance of a barony de-
 “ scendible to the heirs of the body one of the co-heirs
 “ is attainted for treason; and after reference made to a
 “ certain act of parliament passed in the first year of

“ Queen Elizabeth, intituled ‘ An Act to restore in
 “ ‘ blood the sons and daughters of Edward Lewknor,
 “ ‘ Esquire,’ it is further supposed that A. claims
 “ through the co-heir who was so attainted, and B.
 “ through another co-heir; and your Lordships then
 “ require the opinion of the judges on these two points;
 “ viz., first, is it competent for the Crown to determine
 “ the abeyance in favour of A.; and, secondly, is it
 “ competent for the Crown to determine the abeyance
 “ in favour of B. And although the consideration of
 “ the questions submitted to us involves some matters
 “ of curious learning, upon which no direct authority is
 “ to be found in the books, yet, looking at the principle
 “ by which we conceive the subject matter of those
 “ questions is to be governed, and reasoning by the
 “ analogy to be derived from the decisions of our courts
 “ of law, so far as they can be held to apply to inhe-
 “ ritances of so peculiar a nature as those under con-
 “ sideration, and still further bearing in mind the
 “ decisions of this House on cases which have been
 “ brought before it, the judges¹, who have heard the
 “ argument at your Lordships bar, have arrived at the
 “ unanimous opinion that both the questions proposed
 “ to us are to be answered in the affirmative.

“ My Lords, the general rule by which the abeyance
 “ of a dignity or title of honour is governed was not
 “ disputed at your Lordships bar. It has been indeed
 “ the established and undoubted law upon this subject
 “ from a very early period of our history, that in the
 “ case of a barony descendible either to the heirs

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¹ Tindal, L. C. J.; Vaughan, J.; Parke, B.; Bosanquet, J.; Pat-
 teson, J.; Gurney, B.; Williams, J.; Coleridge, J.; Erskine, J.;
 Maule, B.

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“ general or to the heirs of the body, if the baron die,
 “ leaving only daughters or sisters or other co-heirs,
 “ the dignity is in abeyance so long as more than one
 “ of such co-heirs is in existence, but so nevertheless
 “ that the Crown, the sovereign of honour and dignity,
 “ may at any time during such abeyance determine it
 “ by conferring the dignity on whichever of the co-heirs
 “ it pleases; but if the Crown do not exercise such
 “ prerogative, and the lines of all the co-heirs but one
 “ become extinct, then the abeyance is at an end, and
 “ such only surviving co-heir is entitled as a matter of
 “ right to the enjoyment of the dignity. Lord Coke,
 “ indeed, in his First Institute, 165 a., seems to think
 “ that such has been the law from the time of the
 “ Conquest; but it has, at all events, been acted upon
 “ at the least as early as the reign of Henry the Sixth,
 “ who in the case of the Lord Cromwell dying without
 “ issue male, and leaving several daughters, preferred
 “ the youngest; and in more modern times this exer-
 “ cise of the royal prerogative has been repeatedly put
 “ in force, as, amongst many others, in the case of the
 “ earldom of Oxford in 1625, and that of the barony of
 “ Grey of Ruthin. (See Collins’s Claims, &c., pp. 175,
 “ 248.) But the great contention at your Lordships
 “ bar has turned, not upon the fact, but upon the
 “ nature and qualities of this abeyancy, and upon the
 “ legal consequences of the attainder of one of the
 “ co-heirs pending such abeyance; it being contended
 “ on the one part that the attainder of one co-heir
 “ operates as a forfeiture and extinguishment of the
 “ dignity as to all, and consequently as a restraint of
 “ the exercise of the royal prerogative in giving a
 “ preference to any of the unattainted co-heirs; whereas

“ it is argued on the part of the claimants, that it can
 “ have no effect whatever upon the unattainted line,
 “ but at the utmost restrains the Crown from conferring
 “ the dignity on any descendant in the attainted line so
 “ long as the corruption of blood by means of the
 “ attainder continues.

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“ Now, the argument upon which the forfeiture or
 “ total extinguishment of the dignity rests for its
 “ support is this, that the abeyance of a dignity means
 “ no more than that the person who shall enjoy it is at
 “ the time in uncertainty and expectation, not that the
 “ inheritance itself is in suspense, but that such in-
 “ heritance in the meantime descends to and vests in all
 “ the co-heirs equally, and that the dignity being so
 “ vested jointly and equally in all the co-heirs, and
 “ being at the same time in its own nature indivisible
 “ and impartible, the attainder of one co-heir works the
 “ forfeiture of his share, and all the parts or shares in
 “ the barony being essential to the constitution of the
 “ dignity of baron, and one of them being forfeited, the
 “ whole becomes necessarily extinguished ; and the
 “ authority which has been principally relied upon in
 “ support of these positions is the very learned speech of
 “ Lord Chief Justice Eyre when called upon to deliver
 “ the opinions of the judges in answer to the question
 “ proposed to them by this House in the year 1795 on
 “ occasion of a claim to the barony of Beaumont, in
 “ one part of which speech that learned person has
 “ expressed himself that ‘ the title of the co-heirs of a
 “ ‘ barony is that of unus hæres and unum corpus—it is
 “ ‘ unitas juris—they must take it, and it must vest in
 “ ‘ them as the heir of the aucestors.’

“ Now, before entering upon any discussion of the

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“ points submitted to us, it is to be observed that this-
“ dictum of Lord Chief Justice Eyre, upon which so
“ great reliance has been placed, was not in any way-
“ necessary for the determination of the question put
“ upon that occasion by your Lordships House to the
“ judges. The question submitted to them was, whether,
“ supposing the claimant to have proved himself one of
“ the co-heirs of the barony of Beaumont, he was then
“ entitled of right to the barony, or, in other words,
“ whether one of two co-heirs was a complete heir to
“ the ancestor ; a question which the judges necessarily
“ answered in the negative. But this answer must
“ equally have been given by them whether the dignity
“ had vested in the co-heirs, or whether it had, by
“ means of its being in abeyance, become vested in the
“ Crown ; in either case the answer to the question
“ must have been that the one co-heir was not the
“ complete heir so as to claim the barony as a matter of
“ right. The observation, therefore, to whatever weight
“ it may be entitled as coming from so able a judge,
“ is not to be considered as bearing the same stamp
“ of authority as the opinion of the judges expressed on
“ the very point on which they were called to advise.

“ Now, it is obvious that the whole strength of the
“ position advanced by the Attorney General must
“ depend on these two data : First, that when a barony
“ is in abeyance the share of each co-heir in such barony
“ descends to and vests in such co-heir ; and, secondly,
“ that the attainder of any one co-heir operates as a
“ forfeiture of the part so vested in him ; for if either of
“ these data fail,—if, on the one hand, such be the
“ nature of the abeyance of a dignity that it causes the
“ dignity to revert to or be in the Crown, or, in the

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“ language of the old books, to exist in contemplation
 “ of law only, instead of vesting in the co-heirs, as is the
 “ case with lands and other descendible hereditaments,
 “ it is manifest there can be no forfeiture by the co-heir
 “ of that which was not in him at the time of the
 “ attainer; and again, even admitting that the share
 “ of this impartible dignity did upon the abeyance
 “ taking place descend to and vest in the co-heir, still,
 “ if his interest is not a right of such nature or de-
 “ scription as can be the subject of forfeiture, in either
 “ case the consequence which has been deduced from
 “ the premises, that the whole dignity is extinguished
 “ or gone, becomes altogether untenable.

“ In order, therefore, to arrive at a just conclusion
 “ on the questions put to us, it may be advisable to
 “ consider, in the first place, the properties of the
 “ abeyance of a dignity, and the legal consequences
 “ which flow from such abeyance; and, in the next
 “ place, how far any right or interest which can by
 “ possibility vest in the co-heir pending the abeyancy
 “ is capable by law of being the subject matter of
 “ forfeiture.

“ My Lords, all the instances found in the books of
 “ the inheritance in land or other tenements being in
 “ abeyance have this common property, that there is no
 “ person in existence who is capable of taking. Tenant
 “ for term of another life dies; the freehold is said to be
 “ in abeyance until the occupant enters. Lease for life,
 “ remainder to the right heirs of J. S.; the fee simple is
 “ in abeyance till J. S. dies. (Co. Litt. 342 b.) If the
 “ parson of a church dies, the freehold of the glebe is in
 “ none during the time the parsonage is void, but in
 “ abeyance, viz., in consideration and in the under-

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“ standing of the law, until another be made parson of
 “ the same church; and immediately when another is
 “ made parson the freehold indeed is in him as suc-
 “ cessor. (Littleton, s. 647.) And it is an admitted
 “ consequence, that where the right to the fee simple
 “ is in such abeyance that by possibility it may every
 “ hour come in esse, there the fee simple cannot be
 “ charged, granted, or forfeited until it come in esse.
 “ Lease for life, remainder to the right heirs of J. S.,
 “ the fee simple cannot be charged till J. S. be dead
 “ (Co. Litt. 343.); or, as is stated in *Termes de la Ley*,
 “ title Abeyance, after one comes in existence to take it
 “ is no longer in abeyance, but in such sort ‘ that the
 “ ‘ right heir may grant, forfeit, or otherwise dispose of
 “ ‘ the same.’

“ Further, the peculiar nature of the inheritance in a
 “ dignity or title of honour has an important bearing
 “ on the question, whether it is capable of vesting in
 “ co-heirs. That lands and tenements of inheritance
 “ vest in co-heirs is undeniable; the law of parcenary
 “ is too well known to make it necessary to advert
 “ to it; but in all the instances in which inheritances
 “ are stated in our books to vest in co-heirs, that is, in
 “ several persons making together one heir, it will be
 “ found the hereditament is always capable of being
 “ actually enjoyed by the co-heirs. Land may be
 “ either held and enjoyed by all the co-heirs jointly, or,
 “ after partition made, by each co-heir in severalty.
 “ Where the tenements are in their nature entire and
 “ indivisible, as in the case of advowsons, the co-heirs
 “ may enjoy by appointing to the living in turn,
 “ according to their seniority. If under the ancient
 “ law a villein had descended to the co-heirs, either the

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“ profits were divided, or one co-heir. had the services
 “ of the villein for one week, the other for the next.
 “ In the case of common without number, or piscary,
 “ estovers, and the like, the eldest co-heir shall take,
 “ and the rest shall have contribution ; or if the eldest
 “ cannot make contribution, there shall be an allotment
 “ made to the one for so long time, and afterwards to
 “ the others ; and so as to a mill or a toll. But in all
 “ these cases the subject matter is capable of actual
 “ permanency and enjoyment, and it is absolutely
 “ necessary for the purpose of having such enjoyment
 “ that it should descend to and vest in the co-heirs ; the
 “ inheritance therefore descends upon them, and they
 “ settle and arrange the mode of enjoyment amongst
 “ themselves. But far different is the case of a dignity ;
 “ it is an inheritance which is peculiarly *sui generis* ; it
 “ is not only in its nature impartible amongst the
 “ co-heirs, but in its undivided state utterly incapable
 “ of being enjoyed by any one co-heir. They cannot
 “ all take the barony ; no one can take it by law in
 “ preference to another ; nor is there any mode, by
 “ mutual arrangement, concession, or otherwise, by
 “ which all can enable any individual co-heir to wear
 “ the dignity. The reason, therefore, fails for holding
 “ that they take the inheritance of the barony, when
 “ they cannot take it for any available purpose. And
 “ this consideration at the same time fortifies and con-
 “ firms the doctrine of abeyance as understood in
 “ ancient times, which places the inheritance anywhere
 “ rather than in the co-heirs.

“ And this mode of reasoning agrees with the law
 “ laid down by Lord Coke (1st Institute, 165 a.), viz.,
 “ ‘ that the King, who is the sovereign of honour and

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“ ‘dignity, may, for the uncertainty, *confer* the dignity
 “ ‘upon which of the daughters he pleases;’ and again
 “ with that of Whitlocke, who says, ‘the King may
 “ ‘*revive* the honour in the issue of either, or suffer it
 “ ‘to lie in abeyance or unrevived;’ language which
 “ of itself seems to import that the dignity has not
 “ vested in any of the co-heirs; for he that has the
 “ power to *confer* must already have the dignity in
 “ himself before and at the time of his so conferring it;
 “ whereas if the dignity was already vested in others it
 “ must first be divested out of those co-heirs, before,
 “ in strictness of language, the sovereign would be in a
 “ condition to confer it. The writ of summons, or the
 “ patent, according as the co-heir is a male or female,
 “ must, on that supposition, have a double operation,
 “ one of which is very foreign to their nature, namely,
 “ that of divesting the inheritance in the dignity out of
 “ the several co-heirs, except as to the one who is
 “ favoured and preferred, and uniting the different
 “ shares in him.

“ Looking, therefore, at the peculiar description and
 “ properties of a dignity or name of nobility, there
 “ appears nothing in the nature of the inheritance, or
 “ in reason, that should, *à priori*, cause it to descend
 “ to and vest in co-heirs who are altogether incapable
 “ of taking in the only way in which the subject matter
 “ can be enjoyed, that is, by wearing the dignity; and,
 “ on the contrary, it would seem much more suitable
 “ to its nature, and more consonant to reason, that
 “ when it has arrived in the stream of descent at a
 “ point beyond which it can no longer proceed in its
 “ regular course, when it is confessedly by all in a
 “ state of abeyance, that it should revert to and so long

“ as such abeyance continues remain in the Crown,
 “ that fountain of honour from which it originally pro-
 “ ceeded.

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“ But there is an authority on this subject entitled to
 “ the greatest weight, and proving that this doctrine
 “ does not rest upon speculation and argument alone ;
 “ I allude to the judgment in the case of the claims of
 “ the Lord Willoughby of Eresby and the Earl of
 “ Oxford to the great office of lord chamberlain, and
 “ the baronies of Bulbeck, Sandford, and Badlesmere.
 “ In that case the judges certify to your lordships
 “ house, ‘ that John, the fifth Earl of Oxford, dying
 “ ‘ without issue, those baronies descended upon his
 “ ‘ sisters and heirs, but these dignities being entire,
 “ ‘ and not dividable, they became incapable of the
 “ ‘ same, otherwise than by gift from the Crown, and
 “ ‘ they, in strictness of law, reverted unto and were
 “ ‘ in the disposition of King Henry the Eighth.’ Coll.
 “ Claims, 175. Sir W. Im. 96. And again, in a
 “ further opinion, the language employed by the same
 “ eminent judges is this, ‘ That by the death of Earl
 “ ‘ John in 18 Henry the Eighth (Coll. p. 180.) without
 “ ‘ issue, leaving three sisters, those honours returned
 “ ‘ to the Crown in strict construction of law ;’ and
 “ thereupon this House agreed, ‘ That the three baro-
 “ ‘ nies are in His Majesty’s disposition ;’ and in the
 “ formal certificate delivered to the King of the opinion
 “ of this House they say, ‘ That for the baronies they
 “ ‘ are wholly in Your Majesty’s hands, to dispose at
 “ ‘ Your own pleasure.’ Jour. vol. cxi. p. 552. Now,
 “ although it must be admitted that the generality of
 “ this certificate, which perhaps exceeded in its appli-
 “ cation what was intended by the learned judges

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“ themselves, has been in subsequent cases qualified
 “ and limited by restraining the power of the Crown to
 “ that of selecting one amongst the co-heirs, and again,
 “ in another particular, viz., that the co-heirs being
 “ reduced to one, such surviving co-heir has the right;
 “ still the main ground of the decision, viz., that the
 “ dignity had reverted to the Crown, remains altogether
 “ unshaken; and the inference to be drawn from that
 “ judgment is, that where all have equal pretence, and
 “ no one can claim *ex debito*, that the dignity is to be
 “ considered as in the Crown.

“ And as to the objection urged by Mr. Attorney
 “ General, that there must of necessity be an actual
 “ descent and vesting in the co-heirs, for on no other
 “ supposition could the only surviving co-heir claim a
 “ writ of summons as a matter of right, the answer may
 “ well be, that when the number is reduced to one the
 “ only reason and cause of any suspension or abeyance
 “ is at an end, and that the reason ceasing, the conse-
 “ quence also ceases, and the whole entire and impartible
 “ dignity may then be well supposed to fall upon the
 “ complete heir, as in the usual course of descent.

“ Now if it be the law that the barony does not
 “ descend to the co-heirs, and vest in each in separate
 “ parts and shares, there is at once an answer to the
 “ question, whether whilst the dignity is in abeyance
 “ the attainder of one of the co-heirs shall operate as a
 “ forfeiture or extinguishment of such dignity; for
 “ upon that supposition there was nothing in the person
 “ attainted which could become the subject of forfeiture;
 “ the whole had reverted to the Crown for the pre-
 “ servation of the title until the co-heirs were reduced
 “ to one, or until the Crown in the meantime declared

“ a preference *privatio præsupponit habitum*, and on
 “ the supposition above made the party who was attainted
 “ had nothing in the dignity to forfeit.

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“ But, my Lords, conceding, for the sake of argu-
 “ ment, and for that purpose only, that pending the
 “ abeyance the inheritance in the dignity had descended
 “ to and amongst the several co-heirs in the same
 “ manner as any other inheritance, still no authority
 “ has been cited in support of the position that the
 “ attainder of one co-heir would operate as a forfeiture
 “ of the whole dignity. It is evident from the old
 “ authorities that in the case of land a co-heir attainted
 “ of felony or treason forfeits the share descended to
 “ him, and that share only. If the other co-heirs sue,
 “ and there is a plea in abatement that one of the
 “ co-heirs is not joined as a co-demandant, those who
 “ are demandants may reply, ‘ that he need not be
 “ ‘ joined, for that he has committed felony, so that he
 “ ‘ is not a parcener.’ (Fleta, cap. 48, De exceptione
 “ ex omissione participis.) If, therefore, the inheritance
 “ had descended, and had been considered as partible,
 “ the attainder of one co-heir could not have operated
 “ as a forfeiture of the title to the shares vested in the
 “ other co-heirs. And if such be the law in case of
 “ partible inheritances, it would surely be a strange
 “ conclusion, that because, from the peculiar nature of
 “ a dignity, it is impartible, therefore the whole should
 “ be forfeited by the attainder of one. Forfeiture is
 “ always odious in the eye of the law, and the inference,
 “ at once more just and more consistent with the genius
 “ of our law, would be, that where the inheritance is
 “ impartible, on that very account there should be no
 “ forfeiture at all, inasmuch as the opposite determina-

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“ tion would confound in one common punishment the
“ innocent with the guilty.

“ But, my Lords, it should be further considered
“ whether the interest which devolves upon each co-heir
“ pending the abeyancy, supposing the dignity not to
“ revert to the Crown, is of such nature and description
“ as to be the subject of forfeiture either by common law
“ or statute. That all dignities or titles of honour, what-
“ ever be the estate in them, are forfeited and lost by
“ the attainder of the possessor for high treason, is
“ undoubted law. ‘Is it not’—as has been justly asked
“ by Mr. Charles Yorke in his Considerations on the
“ Law of Forfeiture (p. 30.)—‘both natural and politic
“ ‘that a distinction bestowed only for the praise of
“ ‘them who do well should be forfeitable on the
“ ‘commission of crimes, for a terror to evildoers?’
“ But neither by common law or statute did the law of
“ forfeiture comprehend within its limit any such right
“ as that which is supposed to exist in the attainted
“ co-heir, or any right bearing any analogy to it. At
“ common law the only real estate which was forfeited
“ by attainder for treason were all the lands of inheri-
“ tance whereof the offender was seised in his own
“ right, and all rights of entry to lands in the hands of
“ a wrongdoer; and under the statutes 26th Henry the
“ Eighth, cap. 13., and 33d Henry the Eighth, cap. 20.,
“ such forfeiture was made to extend to estates tail
“ vested in possession; but it has always been held,
“ that neither by common law or statute was a mere
“ right of action to lands in the hands of a stranger, as
“ for instance in the hands of a discontinuee, or of the
“ heir of the disseisor, forfeitable by attainder for
“ treason. (Coke Littleton, 8. 3., Co. 2. 3., Hob.

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“ Rep. 240.) But how far does the interest which is
“ in the attainted co-heir at the time of the attainder
“ fall short of a right of action? It is a part or portion
“ only of the title of co-heir to the dignity, giving the
“ possessor of it at the utmost a *jus precarium*, a mere
“ power of asking from the grace and favour of the
“ sovereign that the abeyant dignity may be conferred
“ upon him, with the distant chance that in case all the
“ other lines should fail the attainted co-heir may, in
“ case the corruption of blood be removed, wear the
“ dignity himself.

“ Other considerations, of a nature perfectly distinct,
“ range themselves on the same side of the question,
“ and strengthen the inference that no forfeiture of the
“ dignity can under the circumstances assumed take
“ place. To hold that the dignity is extinguished or
“ forfeited, whilst it remains with the Crown by an
“ exercise of its prerogative to revive it, and confer that
“ dignity on one of the innocent co-heirs, what is it in
“ effect but to abridge and limit such prerogative of the
“ Crown, and to operate more as a penalty upon the
“ innocent co-heirs, than on the guilty offender? And
“ I must confess I feel strongly the weight of the ob-
“ servation which has been made at your Lordships bar,
“ that if the attainder of one of the co-heirs of a barony
“ whilst it is in abeyance causes the extinguishment or
“ forfeiture of the abeyant barony, it must be matter of
“ very considerable doubt whether such an attainder,
“ *after* the abeyance has been determined, and the
“ barony revived by the Crown, must not be attended
“ with a similar consequence, for it is one and the same
“ dignity, whether it is in abeyance or in possession;
“ and, upon all just principles of reasoning, the con-

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“tinued existence of such dignity must be held to
“depend equally in both cases upon the same title, and
“the same connexion with the deceased ancestor.

“But I forbear to pursue the consideration of these
“additional arguments, because, as it appears to me,
“the very principle now under discussion, viz., that the
“attainder of one of the co-heirs shall not operate as a
“bar to one claiming through another of the co-heirs
“to the dignity, has been virtually adopted and acted
“upon by your Lordships House in several cases. I
“refer to the case of the Powys barony, where John
“Gray, the descendant of one of the co-heirs of Edward
“Charleton Lord Powys, was summoned to parliament
“in the 22d Edward the Fourth, after the attainder
“and before the restoration in blood of John Lord
“Tiptoft, the other co-heir, enjoying upon that writ of
“summons the seat and precedence of his ancestor.

“I refer again to that of the barony of Beaumont, in
“the first petition of the claimant, to which barony he
“made title as sole heir, upon the ground that the
“attainder of the other co-heir had extinguished that
“line, and which petition gave occasion to the learned
“discussion of Lord Chief Justice Eyre, before referred
“to. Upon the occasion of his second petition he
“stated his title as one of the co-heirs of Henry the
“first Baron Beaumont, by his descent through Joan
“Lady Stapleton, Sir Henry Norreys, the son of
“Frideswide, the other co-heir of the barony, having
“been attainted and executed in the 28th year of
“Henry the Eighth. Upon this second petition the
“report of the very learned Attorney General of the
“day, Sir John Scott, raises no difficulty as to the ex-
“tinguishment or forfeiture of the barony, but simply

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“ states it to be in abeyance; and the committee of this
 “ House, after argument before Lord Loughborough,
 “ the then Lord Chancellor, came to the resolution,
 “ which was afterwards reported to the House, ‘That it
 “ ‘ appears to this committee that the said barony
 “ ‘ remains in abeyance between the co-heirs of the
 “ ‘ said William descended from his sister Joan;’
 “ which resolution was received and adopted by this
 “ House.

“ My Lords, such being the grounds upon which the
 “ rights of the co-heir in the unattainted line depend,
 “ it remains only to make an observation upon the
 “ legal operation and effect of the act 1 Eliz., No. 22,
 “ to which your Lordships question makes reference,
 “ with regard to the rights that may be claimed by the
 “ co-heir in the attainted line.

“ And, my Lords, it appears by this statute that
 “ nothing that had been lost by the attainder has been
 “ restored to the descendants of the attainted person,
 “ but that the corruption of blood is so completely re-
 “ moved thereby that the heir may claim through his
 “ attainted ancestor as if no attainder had taken place.
 “ That the previous attainder of the co-heir effected no
 “ forfeiture of the abeyant barony has been already so
 “ fully discussed as to make it unnecessary to state
 “ more than that the descendant of such attainted co-
 “ heir may claim the right of petitioning Her Majesty
 “ that she would terminate the abeyance of the barony
 “ by giving the preference to the line of such petitioner,
 “ in the same manner as if his ancestor had never been
 “ attainted.

“ Upon the whole, although I should not be justified
 “ in making my learned brethren responsible for the

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“ precise grounds upon which I have endeavoured to
“ support their opinion and my own, yet I have their
“ full authority to declare our unanimous answer to the
“ questions proposed to us, as follows :

“ 1st. That it is competent to the Crown to de-
“ termine the abeyance in favour of A.

“ 2d. That it is competent for the Crown to de-
“ termine the abeyance in favour of B.”

The Committee having resumed consideration of the claims, the following opinions were (15th August 1839) expressed by their Lordships:—

LORD CHANCELLOR.—My Lords, this case, since it was heard before your Lordships, has been the subject of anxious consideration by several noble Lords who took a part in the discussion. I have thought it my duty to look carefully into the pedigree, and the result is, that I am satisfied, as far as I can be satisfied after an investigation of transactions as far back as this investigation necessarily leads one, that the claimant, Mrs. Otway Cave, has proved her descent from Elizabeth, the second daughter of Edmund Lord Braye, who appears to have sat in parliament in the reign of Henry the Eighth.

My Lords, another party is also a claimant, and whose claim has been referred by the Crown to the consideration of this House; and that other party, Sir Percival Hart Dyke, appears also to have made out his pedigree as descended from Frideswide, the third daughter and fourth child of that Edmund Lord Braye.

My Lords, in the investigation of this claim two questions of law have been raised: with respect to the

one, it is not now raised for the first time, but, on the contrary, it has been raised in several other cases, and has received that decision from this House which I apprehend for the present purpose is to be considered as putting that question at rest. I refer to the effect of the evidence of a sitting in this House under summons by writ, where it has been proved, on careful examination of all the depositories where the patent would have been likely to have been found, that there is no trace of any patent. The last case that came before your Lordships under these circumstances was the Vaux case, in which the preceding cases were very carefully reviewed; and the result was, that your Lordships adopted in that case the resolution which had been adopted in some of the preceding cases,—that where the summons, and a sitting under it, are satisfactorily made out, it is evidence of the title to the peerage descending to heirs of the body including females. That is the nature of the title made out by the present claimants as descending from Edmund Lord Braye.

My Lords, another question also which had been discussed in former cases arose in this case; namely, the effect of an attainder on one of the line of co-heirs. In a case which occurred some years ago an opinion of very high legal authority was expressed, that the effect of that attainder might be fatal to the claim of the co-heirs. My Lords, I confess that I never could enter into the grounds on which that opinion was supposed to have been entertained; and your Lordships, probably feeling a doubt as to the accuracy of that opinion, had the benefit of having that point discussed before the learned judges in the course of the present session, and whose

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opinion has been delivered by the Lord Chief Justice of the Common Pleas. My Lords, the unanimous opinion of the judges, delivered by the Lord Chief Justice of the Common Pleas, appears to me to put the question entirely at rest. The grounds on which the learned judges came to the conclusion which has been communicated to your Lordships appear to me satisfactorily to remove those doubts which existed, I believe, only in the expression of the opinion of a great legal authority. Undoubtedly, if your Lordships shall concur in the view taken in the opinion as delivered by the learned judges, that second difficulty is removed out of the way.

Those difficulties being removed, we then come to the result; and, if your Lordships shall be of opinion with me, that Mrs. Otway Cave has made out her title of descent from Elizabeth the second daughter of Edmund Lord Braye, and that the other claimant, Sir Percival Hart Dyke, has made out his claim from Frideswide the daughter next younger in succession, then the only question which will remain will be what report your Lordships shall make to the Crown with respect to the descendants of the other daughters of that Edmund Lord Braye. My Lords, there are several parties who appear to be descended from the other daughters. The eldest daughter appears to have been Anne, and there are several parties who are now represented as being co-heirs of Anne. The present Duke of Bedford also appears to be descended from a younger daughter, and Sir Francis Vincent is represented to be a descendant of, I think, the youngest.

My Lords, various courses have been adopted in former investigations of this case, as to the report which

the committee of this House should make to the Crown upon the subject of the collateral branches, where there are, as in the present case, parties who have not claimed, but whose pedigrees have been investigated by the parties who do claim, in order that the Crown may be informed, as far as such an inquiry can lead to a satisfactory conclusion, as to the fact, what descendants there are who stand in the situation of co-heirs, as well as the claimants whose claims are referred to this House. My Lords, the history of those various lines has been to a very great degree satisfactorily made out; but it is not to be expected that parties making out the pedigree of another family should be enabled so accurately to trace the history of that family as of course they must be called upon to do when making out the pedigree of the line under which they claim; and the parties are not here themselves to make any claim. The sole object, therefore, of that investigation is to obtain knowledge, with a view to communicate to the Crown what persons there are standing in the same relative situation as those who make the claim, that the Crown, before it exercises a discretion whether it shall determine the abeyance at all, or, if it shall determine the abeyance at all, in favour of whom it shall be determined, may be informed of the state of the different parties who are descended from the common ancestor from whom the title is derived. I think that, though the evidence of the various lines is not so conclusive as to justify a report stating that they are descendants, there is sufficient evidence before your Lordships to enable you to report to the Crown so much as may be necessary to enable the Crown to exercise its discretion on the subject of those several lines: there is danger of saying too

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much, because the sort of investigation which has been gone into is necessarily imperfect, in consequence of the absence of those parties.

My Lords, I observe there are four different modes in which a report has been framed ; in some cases it has been reported that there appear to be descendants or the several persons from whom their descent is claimed ; there are others in which the report has identified the individuals who appeared to make out their descent in those several lines ; but with respect to those who have not claimed, and who are not therefore candidates, it can hardly be supposed that the Crown will exercise its discretion in favour of either of those parties. It seems, therefore, necessary to say no more than that there appear to be descendants proved of the several lines whose pedigree has been brought before your Lordships by those who are candidates, and have applied to the Crown to terminate the abeyance in their favour. Upon the whole, it appears to me the safer course, instead of pronouncing any opinion on those collateral pedigrees, to report merely that there appear to be descendants living of several females through whom their lines are traced. That report will be quite sufficient if it shall become material to prosecute that inquiry further, and will relieve your Lordships from the giving any opinion as to facts which have not been sufficiently examined in the investigation before your Lordships to enable you to come to a satisfactory result. What I should propose, therefore, to your Lordships is, to resolve that it appears that the barony was a barony by writ descendible to females as well as males ; that it is in abeyance between the co-heirs of John the eldest son of Edmund Lord Braye, which John Lord Braye sat in parliament

in the 31st of Henry the 8th; that Mrs. Otway Cave has made out her claim of descent from Elizabeth the second daughter of Edmund Lord Braye; that Sir Percival Hart Dyke has made out his descent from Frideswide the third daughter of Edmund Lord Braye; and that it appears that there are descendants living of Anne the eldest daughter of that Edmund Lord Braye, and also of his two youngest daughters. It appears to be quite sufficient to state the fact of there being descendants living of those several lines, without specifying the individuals who appear upon the evidence to stand most likely in the situation of descendants of those lines.

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LORD WYNFORD.—My Lords, I entirely agree in the opinion expressed by the noble and learned Lord on the woolsack. The two claimants, Sir Percival Hart Dyke and Mrs. Otway Cave, have satisfactorily, in my opinion, made out their claims. With respect to the others, I have not sufficiently attended to their cases to say whether their pedigrees are proved or not. In one of the cases I am quite convinced the pedigree is not proved. Those will very properly be left by the report in such a state that if those who are interested should think proper to bring them forward they may have their claims considered.

As to the points of law, it certainly is an anomaly that a person who has a grant from the Crown without any words of limitation should have any estate beyond his own life, yet in peerage cases it has been established that a person who is summoned to parliament, though only for one parliament, and who takes his seat, thereby

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becomes a baron in fee, and it is now too late to dispute that law.

As to the point which was raised by the Attorney General, that the attainder of the descendants of one of the co-heirs forfeits the whole peerage, I am of opinion that that person had nothing in him which he could forfeit at the time of the attainder; if he had there probably might be some ground for saying, that as a part of the peerage was gone by that attainder all that remained was not sufficient to constitute a peer. Perhaps, as the learned Chief Justice, whose excellent opinion your Lordships have received, has said, there was nothing at that time in any of the claimants, and there will be nothing till the Crown thinks proper by its prerogative to confer it. I think it appears clearly from the passage cited by the Lord Chief Justice from Lord Coke, that where there is nothing to forfeit, and that there is nothing to forfeit in such cases as these, there an attainder cannot work an annihilation of the peerage.

As far as regards corruption of blood, or the placing a party in such a situation that nothing can be transmitted through him, that has been completely taken away by the statute to which we have been referred by the Lord Chief Justice. I also think that the statute of Anne would have been sufficient in this case to have prevented the corruption of blood, stopping a portion of the peerage from descending through the corrupted ancestor. There may be some doubt whether the words of that statute apply to attainders that took place before the passing of the act, but in such cases as these the words are to receive the mildest construction; and

though I do not think that that statute could restore a forfeiture which was complete before the passing of the act, yet I think the words may be so construed as to prevent the attainder from operating to stop the descent of any peerage through the attainted person. For these reasons, my Lords, I concur with the Lord Chancellor in recommending to your Lordships the resolution which he has proposed to you.

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EARL OF DEVON.—My Lords, having attended throughout the discussion of this claim, and had an opportunity of talking with my noble and learned friend upon it, if I had felt any difference of opinion in the result to which he has come I should have felt it my duty to state it; but I am of opinion that Mrs. Otway Cave and Sir Percival Hart Dyke have made out their claims as representing the two co-heirs from whom they respectively derive. Upon the point of law it is not necessary to say any thing; the point to which my noble and learned friend who spoke last has referred has been now so many years settled law that we cannot entertain any question upon it at present. There arose in a previous case the question, not merely whether a sitting under a writ created a peerage in fee, but whether in a case where the writ was not produced this House could look to other evidence and decide that there was that which would give a barony in fee; that question also has been decided, and it is not now, I think, open to us to entertain or express any doubt on the propriety of that decision. The points of law, I conceive, are decidedly in favour of the existence of this peerage in those persons who represent the co heirs of

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Edmund Lord Braye as descending from the sisters of John Lord Braye.

My Lords, with respect to the form in which the resolutions are to be entered on claims of this nature, it has always struck me that there is a very great difficulty in the general way of putting them, and I suppose that difficulty has struck other persons, because unquestionably the resolutions vary; there is no strict rule as to the form of the resolutions. If you do not make some investigation into the titles of all the co-heirs you do not give the Crown that information which the sovereign is entitled to when it has made a reference to you with respect to an honour; but, on the other hand, if you call upon the claimant appearing at your bar to make out all the pedigrees of the other co-heirs, you impose a great difficulty upon that co-heir, to bring proof of three or four or five lines without having those opportunities and those facilities which the parties themselves would have of making out their pedigree. In the choice of those difficulties, I approve of the course which my noble and learned friend has proposed to your Lordships to take, as the most judicious; namely, to state an opinion upon those two lines, in respect of which claimants appear before the House, and then just to state enough to give to the sovereign notice that there are in existence other persons who claim to be co-heirs with those who have established their pedigrees. It is then for the sovereign to exercise a discretion, either to determine the abeyance in favour of A. or B., or to consider the existence of other co-heirs as a reason for not determining it. Having such information on the whole case as we have

given, I am of opinion that the two who have claimed have made out their claim as co-heirs, and that there are others who probably would be able to make it out, if they were to give their evidence. In both the substance, therefore, and the form of the resolutions I entirely concur.

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The resolution, as moved by the Lord Chancellor, passed in the affirmative, and the chairman was directed to report the same to the House.

15th August 1839.—It was moved to resolve, “ That
“ the barony is now in abeyance between the co-heirs
“ of John the last Lord Braye, and that the petitioner
“ Sarah Otway Cave, and the petitioner Sir Percival
“ Hart Dyke baronet, with certain others, are the
“ co-heirs of the said John Lord Braye.”

On the question being put, it was resolved in the affirmative, and the chairman was directed to report the same to the House.

[27th August 1839.]

BARONY OF CAMOYS.

Mr. FLEMING for THOMAS STONOR, Claimant.

SOLICITOR GENERAL for Sir JACOB ASTLEY Baronet
and HENRY L'ESTRANGE STYLEMAN Esquire,
Claimants.

The ATTORNEY GENERAL for the CROWN.

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THE result of the evidence of the pedigrees of these several claimants will be found in the resolutions moved by the Lord Chancellor, and approved by the committee, *postea*, pages 39, 40.

Two points of law and practice in questions of peerage, similar to those determined in the preceding case of the barony of Braye, (see Report, ante, page 24,) were determined in like manner by the committee in the present case.

It was likewise held that the term "banneret" being added to a name in a writ, will not prevent a barony by writ being established upon the usual evidence.

The following opinion was expressed by the Lord Chancellor:—

LORD CHANCELLOR.—My Lords, in this case your Lordships have had to inquire into various claims which

are made to a peerage, the origin of which peerage cannot be traced, excepting that the individual from whom the claimants derive their descent is proved to have sat as a peer in this House; this House having held, under those circumstances where no writ can be found, but where there is proof of the ancestor having sat in this House, that the presumption is that he was summoned by writ; and if summoned by writ, and sitting under the writ, then that the peerage is descendible to heirs general of the body.

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My Lords, in this case there is no doubt that Thomas Lord Camoys sat in this House. Some question has been raised, owing to an expression having been used in a writ to the sheriff in the seventh of Richard the Second, in which Sir Thomas Camoys is described as a banneret, and much investigation has been had for the purpose, on the one side, of showing to your Lordships that a banneret might have sat in this House at that period of our history who was not a baron, and, on the other side, for the purpose of showing that the words baron and banneret are synonymous, and have the same meaning: that banneret was not an order of knighthood, but descriptive of a baron, according to the language of those times.

My Lords, certainly the history of the term banneret is not very satisfactory. There is a great uncertainty as to its original meaning; but when your Lordships find the fact of this Thomas Lord Camoys having sat in several parliaments, and that other individuals, who are ancestors of families now sitting in this House,—who are peers, were bannerets, I think the circumstance of the

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appellation of banneret having been added to his name in that writ is not such as ought to prevent your Lordships coming to the conclusion to which you have come in other cases,—of the barony having been a barony by writ, descendible to the heirs general of that Thomas Lord Camoys.

My Lords, another question arose in this case, which also arose in a case in which your Lordships have made a report, namely, the case of the Braye Peerage, in consequence of one in the line of the co-heirs having been attainted. My Lords, I do not again advert to that point; it was the subject for consideration and of argument before the learned judges, and your Lordships have had the unanimous opinion of all the learned judges who were present at that discussion, entirely agreeing with the opinion which I myself formed from the arguments at your Lordships bar, that that is no impediment to the claim either of the collateral branches, or even of those who claim through the attainted line, the corruption of blood having been removed by act of parliament.

My Lords, this case really, therefore, resolves itself into a question of pedigree; and in all cases of this sort there always must be, from the nature of the case, a considerable degree of doubt as to whether what appears to be evidence of pedigree be or be not satisfactorily made out. If it appears to be satisfactorily made out according to the evidence as it stands, it may satisfy your Lordships minds that the pedigree is proved; but in all cases of pedigree so much depends not only upon the evidence which is produced, but upon that which is

lost by the lapse of time, that it is always attended with a great degree of uncertainty; and all which your Lordships can do is to come to the best conclusion which you can, always feeling that there may be something behind which, if produced, would alter the proof.

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My Lords, having looked into the proof of this pedigree with the attention which the importance of the subject requires, and which, from the difficulty of tracing the descent from so early a period, necessarily becomes incumbent upon those whose duty it is to investigate the title of a claimant, it does appear to me that the pedigree has been proved; that is to say, that, on the evidence as it now stands, your Lordships cannot come to any other conclusion than that the claimant Mr. Stonor has made out his claim, which he places under your Lordships consideration, and has established his descent from that Thomas Lord Camoys.

My Lords, another co-heir is Anthony George Wright Biddulph, who is not a claimant, but whose title and pedigree it becomes your Lordships duly to investigate, for the purpose of ascertaining and reporting to the Crown between whom the abeyance now exists. That pedigree, which is also a branch from the same family as Mr. Stonor, is, I think, also satisfactorily made out. These two parties derive their title from Margaret, who was the eldest grand-daughter of Thomas Lord Camoys.

There is another branch of the family who derive their title from the younger sister of that Margaret, namely, Henry L'Estrange Styleman and Sir Jacob

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Astley, and I think that those lines of pedigree are also proved. Mr. Styleman, however, appears to derive his descent from an elder sister; therefore, as between themselves, Mr. Styleman claims through a senior branch.

My Lords, so far it appears to me to be not open to any objection according to the evidence as it stands. There are other parties, one of whom is a claimant, namely, Sophia De la Cainea. That descent is derived from another branch, namely, from another sister of Margaret the grand-daughter of Thomas Lord Camoys, Alianora; and as far as that pedigree is necessary to be investigated for the purpose of tracing the descent to the claimant, Sophia De la Cainea, it appears to me that that also is satisfactorily made out. There is evidence, and I think satisfactory evidence, that there are other descendants of that Alianora. Those parties are not claimants, and that is the most difficult part of the pedigree, and that upon which the evidence has been the least satisfactory. My Lords, it is not important to inquire further into that line, because they are not claimants; and all that your Lordships have to do is, to be enabled to report to the Crown whether the title is in abeyance between the parties who have made out their pedigree, and whether there is reason to suppose that there are other persons who may stand in an equal degree with themselves. Upon that subject I should recommend your Lordships to adopt the course which you adopted a few days since in the Braye Peerage,—of not passing any judgment or expressing any opinion as to the title of the other lines, respecting which there is no claim made; that your Lordships

should report the pedigree proved as far as the claimants are concerned, and state also that there are other persons who appear to be co-heirs. And, my Lords, that is indisputably necessary, for the purpose of enabling the Crown to exercise the discretion which belongs to it after your Lordships shall have reported, at the same time not to express any opinion upon evidence which does not appear so satisfactory as your Lordships would require, if it were necessary to come to any certain conclusion as to the title of those branches.

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My Lords, the result of the consideration I have given to this case would be, to submit to your Lordships certain resolutions which would constitute your Lordships report upon the reference made by the Crown:

“ First, that Thomas Lord Camoys sat in parliament
“ in the seventh of Richard the second: that his barony
“ was created by writ, and was descendible to heirs
“ general: that he had an only son, Richard, who died
“ in his father’s lifetime; who had an only son, who
“ died a minor: that Margaret and Alianora, the two
“ daughters, and Richard the son of the said Thomas
“ Lord Camoys were his co-heirs: that Thomas Stonor
“ has proved his descent from Margaret, the eldest of
“ those co-heirs; and it also appears that Anthony
“ George Wright Biddulph is also descended from the
“ same Margaret, Thomas Stonor being descended from
“ Mary the eldest daughter of John Biddulph, who
“ died in 1720, and the said Anthony George Wright
“ Biddulph being descended from Anne, the youngest
“ daughter of the same John Biddulph: that it has

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“ also been proved that Henry L'Estrange Styleman
“ and Sir Jacob Astley are also descended from the
“ same Margaret, the grand-daughter of the said
“ Thomas Lord Camoys, through Sibella, a younger
“ grand-daughter and co-heir of the said Margaret :
“ that the said Thomas Stonor and Anthony George
“ Wright Biddulph derive their descent through Mar-
“ garet, the eldest grand-daughter of the said Mar-
“ garet ; and that the said Henry L'Estrange Styleman
“ derives his descent through Armine, eldest daughter
“ of Sir Nicholas L'Estrange, the common ancestor of
“ the said Henry L'Estrange Styleman and Sir Jacob
“ Astley ; and the said Sir Jacob Astley derives his
“ descent through Lucy, the youngest daughter of the
“ said Sir Nicholas L'Estrange : that it appears that
“ Sophia De la Cainea is descended from Alianora, the
“ youngest grand-daughter of the said Thomas Lord
“ Camoys ; and that there are other co-heirs of the
“ said Alianora now living.”

That, I believe, exhausts the subject which has
been referred to your Lordships, and puts the Crown
in possession of all the information necessary to be
given.

Resolutions agreed to.

27th August 1839.—It was moved to resolve, “ That
“ the barony is now in abeyance between the co-heirs of
“ Thomas Lord Camoys ; and that the petitioner Tho-
“ mas Stonor esquire, the petitioner Henry L'Estrange
“ Styleman esquire, the petitioner Sir Jacob Astley
“ baronet, and the petitioner Sophia the widow and

“ relict of the most illustrious Chevalier Ferdinand
 “ Joseph Francis Raibaud Della Cainea, with certain
 “ others, are the co-heirs of the said Thomas Lord
 “ Camoys.”

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On the question being put, it was resolved in the affirmative, and the chairman was directed to report the same to the House.

[*27th January, 3d and 6th February, 1840.*]

(From the Court of Exchequer.)

EDMUND PLOWDEN, THOMAS MATTINGLEY, WILLIAM
BUDD, GEORGE BLISS, and CHARLES COWPER,
Appellants.

The Reverend HENRY THORPE, Clerk, Respondent.

By an agreement of 1711 between Mr. Plowden the patron and Mr. Wilson the rector of the church of Aston, the patron agreed to convey lands of the annual value of 130*l*. and to grant a rent-charge of 40*l*. a year for the benefit of the church, and the rector agreed to convey glebe lands of the value of 40*l*. a year to Mr. Plowden, and to exempt other lands belonging to Mr. Plowden from the payment of tithes of the value of 56*l*. a year. This agreement, being under a commission found beneficial to the church, was afterwards sanctioned by the ordinary, and established by a decree of the Court of Chancery, in a suit to which the patron, ordinary, proprietor, and rector were parties. From the time of the agreement all parties acted upon the faith of the agreement, except that the present rector since Michaelmas 1832 refused to receive the rent-charge, and in July 1833 filed his bill against the occupiers of those lands which had been exempted from tithes, for a common account of tithes. Mr. Plowden, the tenant for life of the lands exempted from tithes, was afterwards made a party defendant to the bill by amendment. Upon the hearing in the Court of Exchequer the bill as against Mr. Plowden was dismissed,

and as against the occupiers a decree was made for payment of tithes. Held, upon appeal, that the bill against the occupiers be dismissed with costs, and that the rector could not come into a court of equity and ask for the payment of tithes, without giving up the lands he received from Mr. Plowden as a compensation for his tithes.

Semble.—That a person made a party to a suit by amendment after the time limited by the third section of the second and third of William the Fourth may claim the benefit of the limitation given by the statute, though the bill was filed within the time prescribed by the statute.

WILLIAM Plowden (the ancestor of the appellant Edmund Plowden) was in the year 1711 lord of the manor of Aston, and also patron of the church of Aston in the county of Northampton; and John Wilson was at that time rector of the church of Aston.

“ By articles of agreement dated the first of March
 “ 1711, between William Plowden, lord of the manor
 “ and also patron of the church of Aston, and John
 “ Wilson, rector and incumbent of the church of Aston,
 “ after reciting that the said William Plowden was seised
 “ or owner of divers parcels of land lying and being in
 “ the late common fields of Aston, and that the said
 “ John Wilson, as rector of the said church, and in right
 “ thereof, was seised of several other parcels of land
 “ lying also dispersed in the said late common fields,
 “ and also of a parcel of ground lying and being in a
 “ close (known or called by the name of Aston Close)
 “ in Appletree in the said parish of Aston, being the
 “ glebe lands belonging to said rectory of Aston, and
 “ also of the tithes of all sorts arising as well out of the
 “ said common fields as out of the demesne lands of
 “ the said William Plowden in Aston; and that for

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“ the better improvement of the said common fields the
 “ said William Plowden had lately inclosed the same,
 “ and being desirous that the rights and profits apper-
 “ taining to the said church might be preserved, and
 “ that the present rector thereof and his successors
 “ might enjoy, in right of the said church, an advantage
 “ by and a just proportion of the improvement expected
 “ from such inclosure ; it was agreed that he the said
 “ William Plowden and his heirs, and all and every
 “ person or persons having or claiming any estate or
 “ interest in or unto the lands, tenements, and here-
 “ ditaments herein-after particularly mentioned, should,
 “ on or before the twentieth day of February next
 “ ensuing the date thereof, well and sufficiently grant,
 “ convey, and assure unto the said John Wilson and
 “ his successors, rectors of the church of Aston, for ever,
 “ all that part or parcel of the late common fields of
 “ Aston therein particularly mentioned and described,
 “ and all parcels and pieces of ground or meadow, or
 “ any of them, belonging or appertaining, or set out
 “ or appointed to be held, used, or enjoyed with them
 “ or any of them (except one acre and a half of the
 “ furlong therein mentioned) ; all which said premises
 “ so to be granted to the said John Wilson and his
 “ successors as aforesaid, together with the churchyard,
 “ parsonage house, and close, and the gardens, orchards,
 “ and walls dividing the said gardens and orchards from
 “ the estate of the said William Plowden, and all yards,
 “ outhouses, and buildings, and all ground belonging
 “ thereto, should at all times thereafter be deemed and
 “ taken, and were thereby and by the parties thereunto
 “ declared and agreed to be and to be enjoyed as the
 “ glebe of and belonging to the church of Aston afore-

“ said, and the rector thereof and his successors for
 “ ever ; and also that he the said William Plowden,
 “ and his heirs and assigns, and all such other person
 “ and persons whatsoever as were or should be seised
 “ of the manor, lands, tenements, and hereditaments
 “ reputed to be the said William Plowden’s in Aston
 “ aforesaid, should and would, on or before the said
 “ 20th day of February next ensuing the date thereof,
 “ well and sufficiently grant, settle, and assure unto the
 “ said John Wilson and his successors, rectors of the
 “ said church of Aston, for ever, one annuity or yearly
 “ rent-charge or sum of forty pounds, to be yearly
 “ issuing and going out of, and to be effectually
 “ charged and chargeable upon the said manor, lands,
 “ and hereditaments as counsel should advise, and to be
 “ paid at two equal payments, on the 25th day of
 “ March and 29th day of September every year,
 “ without any manner of deduction for taxes, levies, or
 “ payments of any kind whatsoever, except such as
 “ should be charged upon the annuity itself, with a
 “ power, in case the annuity should be unpaid, for the
 “ said John Wilson and his successors to enter upon
 “ the lands chargeable therewith, and distrain for the
 “ same ; and it was thereby further agreed that the
 “ said John Wilson and his successors, rectors of the
 “ church of Aston, should have certain privileges of
 “ taking away stone, gravel, and mortar, and of using
 “ a certain pool of water, and other small privileges
 “ and exemptions therein mentioned ; in consideration of
 “ all which premises the said John Wilson did thereby
 “ for himself, and as much as in him lieth for his
 “ successors, rectors of Aston aforesaid, covenant and
 “ agree to and with the said William Plowden, his

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about 38*l.* per annum, and that the tithes of the old inclosure lying within the precincts of Aston aforesaid, and belonging to the said William Plowden, were worth about 18*l.* per annum. And they also then found that the several parcels of land and meadow ground lying within the fields of Aston aforesaid as were then inclosed, and by the said articles between the said William Plowden and John Wilson agreed to be settled upon the said John Wilson and his successors, rectors of Aston aforesaid, for ever in lieu of tithes, and the said glebe lands consisted of about 140 acres, and were worth, one year with another, about 130*l.* per annum. And they did also further certify his Lordship that the exchange of the several parcels of land particularly mentioned in the said articles of agreement between the said Mr. Plowden and Mr. Wilson, and also the annual payment of 40*l.* out of the estate of the said William Plowden lying in Aston aforesaid to the said Mr. John Wilson and his successors, rectors of Aston aforesaid, in lieu of the glebe lands belonging to the said church and rectory, and also in lieu of all manner of predial tithes issuing and payable out of the estate of him the said William Plowden lying in Aston aforesaid, would be no ways prejudicial or detrimental to the said Mr. John Wilson or his successors, rectors of Aston aforesaid, but would be an improvement of and augmentation to the said church and rectory of above 60*l.* per annum.

On the return of the said commission the then bishop of Peterborough, by an instrument under his hand and episcopal seal, dated the 17th day of May 1714, by virtue of his authority, ordinary and episcopal, granted his licence for carrying into effect the said articles of agreement.

William Plowden, in Michaelmas term 1714, exhibited his original bill of complaint in the Court of Chancery against John Wilson and the bishop of Peterborough, in order that the said inclosure, exchange, and articles of agreement might be established and carried into effect by the decree of the Court of Chancery. The bishop of Peterborough and John Wilson put in their answers thereto.

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The cause being at issue came on for hearing on the 25th July 1715 before Sir John Trevor, the then Master of the Rolls, who made a decree therein, and thereby ordered and decreed that the said articles of agreement entered into between the said William Plowden and the said John Wilson should be performed, and that the said exchanges of the said lands should be confirmed and made perpetual, and that the said parties should hold and enjoy the said premises according to the said exchange, and that conveyances should be made pursuant thereto.

From the time of the agreement all parties acted under the agreement; the parties to the agreement and those claiming under them respectively enjoying the benefits conferred by the agreement until Michaelmas 1832, when the respondent refused any longer to receive the rent-charge of 40*l*.

Some years after the date of the agreement William Plowden sold the advowson of the rectory of Aston to the president and scholars of Saint John's College, Oxford, who are the present patrons of the rectory. In the month of June 1833 the respondent gave notice to the appellants, Thomas Mattingley, William Budd, George Bliss, and Charles Cowper, tenants to the appellant Edmund Plowden of the lands in Aston, of

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which the said William Plowden was seised at the time of the said agreement of the 1st of March 1711, including the glebe lands received by the said William Plowden under that agreement, to pay tithes in kind in respect of those lands.

By the act of the second and third of William the Fourth, cap. 100. section 2. it is enacted, that every composition for tithes which had been made or confirmed by the decree of any court of equity in England, in a suit to which the ordinary, patron, and incumbent were parties, and which had not since been set aside, abandoned, or departed from, should be and the same was thereby confirmed and made valid in law.

By the third section it is provided that this act should not be prejudicial or available to or for any plaintiff or defendant in any suit or action relative to any of the matters before mentioned now commenced, or which might be thereafter commenced during the then session of parliament, or within one year from the end thereof.

The respondent, on the 16th of July 1833, filed his bill in the Court of Exchequer against the appellants, Thomas Mattingley, William Budd, George Bliss, and Charles Cowper, and thereby stated that in the month of August in the year 1831 he was duly presented, instituted, and inducted into the rectory of Aston, and that he had been, ever since his said presentation, institution, and induction, and was then entitled to all the tithes both great and small within the rectory and parish; and the bill prayed that the defendants might be decreed to come to a fair and just account with the respondent for the single value of the tithes of all and every of the titheable matters and things aforesaid, and

to pay to the respondent what upon such account might appear to be due to him.

The said last-named appellants by their answer insisted upon the agreement, the confirmation by the bishop, and the decree establishing the agreement, and that they had no notice to set out their tithes previously to June 1833; and they insisted that the agreement was entire and ought not to be partially vacated, and that the appellant, Edmund Plowden, who was then lord of the manor of Aston, ought to be made party to that suit, and that the said Court could not make any decree respecting the matters therein stated until Edmund Plowden should be made a party thereto.

The respondent took exceptions to the last-mentioned answer principally on the ground that the defendants had not given a full account of the tithes arisen on their respective farms; and the last-mentioned defendants put in a further answer to the said original bill on the 14th of August 1834.

On the 15th day of January 1835 the respondent amended his bill by making the present appellant Edmund Plowden a defendant thereto, and by alleging that many years ago some agreement was entered into between William Plowden, the ancestor of the said Edmund Plowden, and the then rector of the said parish, by which the lands mentioned in the bill to be in the occupation of the defendants became exempt from the payment of tithes in kind, or whereby the tithes became payable to the said Edmund Plowden and those who claimed under him; and by charging that such agreement, if any such there was, was illegal and not binding in law upon subsequent rectors of the said parish.

The appellant Edmund Plowden appeared to the

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bill, and on the 11th day of May 1835 put in a plea to the bill, which, after setting forth the agreement of the 1st of March 1711, the confirmation thereof by the bishop of the diocese, and the decree of the Court of Chancery, and the several sections of the act of the second and third of William the Fourth, cap. 100, stated that the rectors of Aston-le-Walls had, ever since the agreement of the 1st of March 1711, held and enjoyed the lands and privileges thereby allotted and given to them and received the annuity of 40*l.* per annum in full satisfaction of all tithes of the lands of which tithes were demanded by the bill, and that the only lands occupied by the other defendants to the bill within the parish of Aston-le-Walls were the lands in Aston of which the said William Plowden was seised at the time of making the said agreement, including the glebe lands thereby allotted to him; and the said appellant averred that the said composition for tithes made and contained in and by the said agreement, and confirmed by the aforesaid decree, had not since been set aside, abandoned, or departed from, and that the discharge from tithes thereby effected did exist and was acted upon at the time of the passing of the said statute; and therefore he pleaded the matters aforesaid in bar to the said respondent's bill.

On the 26th day of June 1835 the plea was disallowed by the Chief Baron, who upon a re-hearing confirmed his former judgment, but without costs.

The appellant Edmund Plowden then put in his answer to the said amended bill, and insisted upon the same grounds of defence which had been insisted upon by the other defendants, and also claimed the benefit of the statute of the second and third of William the

Fourth, cap 100; and also insisted that the respondent could not have any decree for tithes until he had restored to the appellant Edmund Plowden the lands and privileges which were then held by the respondent under the agreement, and taken back the ancient glebe of the rectory, which he the appellant was willing to restore in case the agreement should be avoided.

On the 8th of February 1837 the cause was heard before Mr. Baron Alderson.

On the 15th day of February 1837 a decree was made by Mr. Baron Alderson, whereby it was referred to Richard Richards, Esquire, one of the masters of the Court, to take an account of what was due to the said respondent Henry Thorpe from the said appellants, Thomas Mattingley, William Budd, George Bliss, and Charles Cowper respectively, for and in respect of the single value of the tithes of all and every the titheable matters and things in the said bill mentioned; and it was ordered and decreed, that what the said master should find to be due from them respectively upon taking the aforesaid accounts, be answered and paid by the said appellants respectively; and it was further ordered, that it should be and it was thereby referred to the said master to tax the said respondent his costs of the said suit as against the said appellants Thomas Mattingley, William Budd, George Bliss, and Charles Cowper, and that such costs, when taxed, be paid by the said appellants, Thomas Mattingley, William Budd, George Bliss, and Charles Cowper to the said plaintiff; and it was further ordered, that the said respondent's bill be dismissed out of the said Court as against the said appellant Edmund Plowden, but without costs.

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with the usual directions for production of books and examination of witnesses.

From the orders overruling the plea Edmund Plowden appealed, and from the decree all the appellants appealed.

Appellants
Argument.

Mr. Boteler and Mr. Bethell for the Appellants.—The agreement is entire; the rector can have no account of tithes until he restores the advantages he takes under the agreement. Instead of a bill for a simple account of tithes it ought to have been a bill to set aside the agreement to which the rector and ordinary ought to have been parties; but by the statute no proceedings could have been taken against Mr. Plowden in this suit within the time prescribed by that act, nor was there sufficient notice to determine this agreement. In the *Attorney General v. Cholmeley*¹ land was given for land, and tithes for annuity or money payment; the landowners and rector were the only parties to the agreement, and the patron was not a party to the suit in which the agreement was confirmed by decree. Where a legal right is asserted a court of equity takes care that complete justice is done. In usurious transactions relief is only granted upon the terms of paying what is actually due with interest. In this case the rector partly acts upon the agreement, and partly seeks to set it aside, keeping the land and asking for an account of the tithes. It is vain to say that the land is not distinguishable; the Court would see that the value of the lands to be given up was properly ascertained.

¹ 2 Eden, 304.

Mr. Swanston and Mr. Griffith Richards for Respondent.—A bill for an account of tithes is not an equitable proceeding: it is the assertion of a legal right, in respect of which an account is directed in a court of equity. Restitution cannot be raised in this suit; if the appellants are entitled to any equity a proper proceeding may be taken by them for that purpose. [*Lord Chancellor.*—There is no notice to terminate the composition; therefore at the time of the bill filed there would be nothing due: so long as the rector chooses to act under the agreement it is good.] Our proposition is, that the agreement is altogether void. The clergyman is entitled to tithes in kind from the time the notice is given. [*Lord Chancellor.*—However invalid a modus may be, if the rector received the modus he could not receive the tithes in kind.] This case is not distinguishable from the Attorney General v. Cholmeley. It is said that Mr. Plowden ought to be made a party to the suit; if he had been made a party the bill must have been dismissed against him. In a simple bill for tithes the owner of the inheritance need not be a party. But then it is said, he was not made a party to the record until after the time prescribed by the act had elapsed. The act applies only where no suit is depending. If the act be construed literally in case of a devolution, it would apply to the representatives of parties who died pending the suit.

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Respondent's
Argument.

LORD CHANCELLOR.—The question before your Lordships arose upon an appeal from a decision of the Court of Exchequer, by which a decree was made directing an account of tithes generally against certain persons who were occupiers of lands within the parish.

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Mr. Plowden, who it appears was tenant for life and landlord of the lands in question, had been made a party to the suit; but he having pleaded, and that plea being overruled, he remained a party at the hearing, and at the hearing the bill was dismissed against him. According to the proceedings, therefore, as they stand, it was an ordinary decree for tithes against the occupiers of the lands.

The bill was filed on the 16th of July 1833, and to the bill as originally filed there were no parties defendants except the occupiers of the lands. On the 12th of December 1833 those occupiers put in their answer, and stated, what was afterwards proved, and which constitutes the question in the cause, that in the year 1711 an arrangement had been entered into between a Mr. Plowden, who was then the owner of the fee, with the then rector, by which certain lands, the property of Mr. Plowden, were conveyed to the benefit of the church, and certain glebe lands belonging to the church were assigned to Mr. Plowden, and other lands belonging to Mr. Plowden were to be held for the future tithe-free. It appears that this arrangement was afterwards submitted to the consideration of the bishop of the diocese, the bishop of Peterborough, and that, after an investigation as to the terms of that arrangement, it was sanctioned by the bishop; and it appeared also that it afterwards became the subject of a suit in the Court of Chancery, to which the patron, ordinary, proprietor, and rector were parties, and that it ended in a decree establishing this arrangement.

It appears, and I now state what was proved on the investigation which took place before the commissioners appointed by the bishop, that the glebe lands taken by

Mr. Plowden were of the value of 40*l.* a year, and that the tithes were of the value of 56*l.* a year; that the lands given by Mr. Plowden to the church were of the value of 130*l.* a year; and that there was, in addition to those lands so given to the church, a rent-charge of 40*l.* a year upon the other properties belonging to Mr. Plowden.

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It appears that from that time down to the time when this bill was filed, or at all events until very shortly preceding the time when this bill was filed, all parties acted upon the faith of that agreement. It appears that the present incumbent, the present plaintiff, was instituted to this living in the year 1831; it appears that he received the rent-charge of 40*l.* a year, including the payment to Michaelmas 1832; it also appears, and was proved by two witnesses, namely, Willifer and Cowper, that he had at all times remained in possession of the lands, and that at the time the depositions were taken he was in actual possession of those lands which had by Mr. Plowden been devoted to the church in exchange for the advantages he derived under the agreement in respect of his estate.

Now, on looking to the agreement, which it is very material should be very accurately examined and compared with the evidence before the commissioners appointed by the bishop, it appears that, inasmuch as the value of the tithes released exceeded the 40*l.* per annum of rent-charge, and that the value of the lands given by Mr. Plowden exceeded the value of the glebe lands taken by a sum equal, or very nearly so, to 90*l.* a year,—if the 40*l.* a year had been in lieu of the tithes, it would have been an inadequate compensation for the tithes,

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even according to their then existing value, the tithes being 56*l.* a year and the rent-charge 40*l.* If the lands were to be changed for the glebe lands, it would appear that that could not be a contract, inasmuch as the glebe lands were of the value of 40*l.* a year, and the lands granted to the rector by Mr. Plowden were of the value of 130*l.* a year. It is quite clear, therefore, that some part of the lands granted by Mr. Plowden to the rector were in consideration of the discharge of his other lands from tithe. It is most important to keep that fact in view when you come to consider how far the authority, which has been the guide of the Court below upon this subject, can be considered as applicable to the present case.

Now, we find that the present rector succeeding to the rectory found this agreement in operation not binding as contended, and truly contended, because the statute prevented parties, notwithstanding all the solemnities which had accompanied such a contract, giving effect to a discharge from tithes by an agreement which had been thus entered into; but it is perfectly certain that, even if there had been an ordinary composition, the party succeeding to a rectory, acting on a composition made during the time of his predecessor, although he may have had the power to get rid of it, must be considered as so far becoming a party to that arrangement that he cannot, as a matter of course and at once, treat those with whom the contract was subsisting as if no such agreement had been made. But at all events he cannot do this: he cannot claim a compensation for the discharge of tithes, and come into a court of equity to ask for payment of those tithes. Now, it appears that the rector received the 40*l.* till Michaelmas 1832,

and that he still claims the lands; that he gave no notice of any kind till June 1833, and that in the month of July following he filed his bill.

In the case of *Hewett v. Adams*, in 2d Brown's Parliamentary Cases, page 64, this House dismissed a bill for want of proper notice to determine a composition, although the defendant disputed the rector's right to make the composition; and that Lord Thurlow considered as a binding authority in a case in which the defendant had set up a modus, which was the case of *Bishop v. Chichester*, in 2d Brown's Chancery Reports, page 160. In this case there is no question about determining a composition, which, though void against successors, may be adopted, and become binding upon them till avoided, because the rector in this case is still in possession of the lands given in lieu of the tithes. It is said that the Master in taking the account has not gone beyond Michaelmas 1832, when the last payment of the rent-charge was received; but why is the receipt of the rent-charge to stop the account, if the possession of the lands is not to defeat the plaintiff's title to it? While the plaintiff retains the substitute for the tithes he cannot claim the tithes; therefore there was nothing due when the bill was filed. There is, however, a distinct ground of defence growing out of this state of things: the plaintiff holds the lands given in exchange for the tithes by the conveyance of 1711, and the decree gives to the plaintiff the tithes out of the lands agreed to be discharged, but leaves him in possession of the lands given to him as the consideration of the discharge. Equity thus gives its assistance to work the great injustice of restoring to the plaintiff the thing sold without requiring repayment of the consideration.

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This is contrary to one of the first principles of equity, "that he who seeks equity must do equity."

It was said, indeed, that in the case of suits for tithes a court of equity only gives effect to a legal title, and that this principle therefore does not apply to this case. It is quite immaterial what is the nature of the demand; it is the exercise of its jurisdiction which the court withholds, unless the party seeking its exercise will do what the court thinks just. I lately, in the case of *Sturges v. Champness*, in Chancery, had occasion to review the authorities upon this subject, and this was the principle upon which I acted. I think it impossible, therefore, to give to the plaintiff any assistance in equity, without seeing justice done to the other parties to the agreement of 1711. If that were possible in this suit, and if there were no other fatal objections to it, the question would be what such justice required. The agreement was, to give up the land in fee, and to discharge for ever Mr. Plowden's other lands from tithes. The late defendant, Mr. Plowden, was only tenant for life, but if the lands given to the rector are to be restored to Mr. Plowden's estate, and the ancient glebe taken out of that estate and restored to the rectory, it is obvious that the owner of the inheritance must be a party to this proceeding. But there was no such person before the court at the hearing, although the tenant in tail has (in what right does not very well appear) raised this appeal. We must, however, look at the case as it existed at the hearing; this could not be cured by adding him as a party, because the bill makes no case, and asks no relief, for the purpose of raising any such equity.

It has been supposed, however, that there is authority

to support this decree, however opposed it may be to those well known principles of equity to which I have adverted; and that case is the Attorney General v. Cholmley. From the report in 2d Eden 704, it appears that the owner of the land as well as the patron and ordinary were parties, and Lord Northington proceeded upon this: that by the agreement the land given to the rector was an exchange for the glebe, and the money payment in lieu of the tithes, and that the contracts, though contained in one agreement, were distinct. That decree, therefore, did not, as this does, give to the rector the tithes, and leave him in possession of what had been given to the rectory for the purchase of them. It is clear that if this had been so, and he had not had the power of restoring the parties to the situation in which they would have stood if no such agreement had been entered into, he would not have made the decree for the payment of the tithes. The observation that he makes at the close of his judgment is well worthy of remark; he says, "If the parties had made an allowance for the future improved value of the tithes, they would have stood on a different footing, and I should not have been inclined to relieve them; they then would have been purchasers for a valuable consideration by allowing for the future improvements; the equity of the Court would have been suspended by setting up equity against equity, and I should have left the rector to his remedy at law." This does not appear to me to be inconsistent with the opinion he had before expressed, that the agreement was void; he only means that equity would not have interfered, and he obviously alludes to the maxim used by the defendant in that case, "Ecclesia

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[*20th, 24th, and 25th February 1840.*]

(From the Court of Chancery, Ireland.)

WILLIAM DE MONTMORENCY Esquire, Appellant.

HARVEY DEVEREUX Esquire, Respondent.

Sir William Ryves De Montmorency devises his real estate to Harvey Devereux, in trust to permit his natural son William De Montmorency to enjoy the same for ever, subject to his debts, and bequeathes his personal estate to William De Montmorency, and appoints Harvey Devereux, who had for fifteen years before his death been his land agent and general manager of his affairs, the executor of his will. On the 16th April 1829, two days after the death of the testator, William De Montmorency expresses his determination to give an estate at Cooldrina, devised to him by the testator, to Harvey Devereux, and to appoint him land agent and receiver of his estates. On the 18th of the same April Harvey Devereux brings to William De Montmorency deeds of lease and release, dated the 17th and 18th April 1829, ready drawn and prepared, whereby William De Montmorency, in consideration of Harvey Devereux's faithful services, and in discharge of all accounts between Sir William De Montmorency and Harvey Devereux, some of them being unsettled, conveys the estate at Cooldrina to Harvey Devereux in fee, and on the same day, by letter, appoints him the agent of his estates, at a salary of 200*l.* a year, and promises, in case of his removing him without sufficient cause, to give him the same salary. Shortly after the death of the testator a relation of the testator's declared that he intended, as heir at law, to lay claim to

the testator's estates. On the 2d of June 1829 Harvey Devereux proved the will of the testator at Dublin, and on his return home from thence, accompanied by William De Montmorency, made a speech to the tenants of the estates, stating that he was in possession of a secret which might defeat William De Montmorency's title to his estates, but that it should remain with him; and if any one claiming a right to the estates should go to law he would defeat him, as he was always successful in any cases in which he was concerned.—Held, that if the transaction had been complained of in reasonable time it would have been set aside by a court of equity, but inasmuch as in October 1830, upon the investigation of the accounts between William De Montmorency and Harvey Devereux by their respective solicitors, the deeds of 1829 were distinctly called to the attention of William De Montmorency's solicitors, and were adopted by them in the settlement of those accounts, and inasmuch as in December 1830 William De Montmorency had confirmed them by executing another deed, the draft of which had been approved by one of his solicitors, and in 1831 called upon Harvey Devereux to pay a debt due from his father which Harvey Devereux by the deed of 1830 had undertaken to pay, and in 1832 wrote a letter to Harvey Devereux approving of the deeds of 1829, and in 1833 set up the deeds of 1829 as a defence to an action for costs which were discharged by those deeds, and succeeded in that defence, and did not complain of the deeds till 1835, when he filed his bill to set it aside, it was held that William De Montmorency had recognized and confirmed the deed of 1829; and the judgment of the court below, dismissing the bill without costs, was affirmed.

SIR William Ryves De Montmorency, by his will dated the 13th of April 1829, devised and bequeathed his real and personal estates situate in the county of Kilkenny, together with his estate called Cooldrina in the same county, and all other his real and personal

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estate, to the respondent Harvey Devereux, his heirs, executors, and administrators, in trust only to permit the appellant William De Montmorency, and his heirs and assigns, to have, hold, take, and enjoy the same, and all the rents, issues, and profits, and other benefits and advantages of the same for ever, subject to testator's lawful debts and funeral expenses, and 50*l.* a year payable to Richard Jordan, jun., during his natural life, as therein mentioned; and as to his personal and chattel property, consisting of 3,500*l.* late currency, charged and chargeable on the Barrowmount and other estates of the late Ralph Gore, esq., in the county of Kilkenny, and of the rents, household furniture, books, paintings, and other his chattel or personal estates, he thereby bequeathed the same unto the appellant, whom he appointed residuary legatee; and the testator thereby appointed Harvey Devereux executor to his last will and testament.

On the 14th April 1829 Sir William Ryves De Montmorency died.

On the 17th of April Harvey Devereux delivered up possession of the real and the freehold estates of the testator to William De Montmorency, who was the natural son of the testator.

The estates were, at the time of the death of the said Sir William Ryves De Montmorency, subject to judgment debts to the amount of 10,000*l.* or thereabouts, due to John Smithwick of the city of Kilkenny, esq., the father-in-law of Harvey Devereux, under and by virtue of several judgments obtained by John Smithwick against Sir William Ryves De Montmorency in his lifetime, and for the better securing which debts the appellant afterwards executed to the said John Smithwick

a deed of mortgage, bearing date the 18th day of December 1830, of the estates in the county of Kilkenny.

Harvey Devereux, from the month of October 1815 up to the time of the death of Sir William Ryves De Montmorency, was his land agent and general manager of his affairs, from whom he received a salary of 100*l.* per annum as land agent of part of the estates till the end of the year 1818, and from thence till the time of Sir William Ryves De Montmorency's death 200*l.* per annum, on his undertaking the agency over all the estates. The last account settled between Sir William Ryves De Montmorency and Harvey Devereux was settled on the 14th of November 1821, though four several accounts from that period up to the 24th October 1825, when the last account was furnished, were delivered by Harvey Devereux to Sir William Ryves De Montmorency, but the same were not settled and signed upon the day of Sir William De Montmorency's death. William Bayley, being then at the testator's residence, and entitled to an estate at Kilcreene in the county of Kilkenny subject to the testator's life estate therein, insisted upon getting possession of the title deeds and papers relating to the Kilcreene estate; but upon its being found that the title deeds of that estate were mixed up with those relating to the testator's other estates, it was agreed between William De Montmorency and William Bayley that all the deeds and papers should be taken home by Harvey Devereux, in order that he might make a selection, and hand over to William Bayley such of the deeds and papers as related to the Kilcreene estate. With that view all the deeds and papers were taken by Harvey Devereux. On the 16th of April 1829, two days after the death of Sir

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William Ryves De Montmorency, William De Montmorency stated to Dr. Cullinan, who had himself received a deed of gift from the appellant, and which was prepared by Maher, the partner of the respondent, that he had determined upon giving Harvey Devereux the estate and lands at Cooldrina, and also to employ him as his land agent and receiver at the same salary as that paid by his father. On the 18th of April 1829 William De Montmorency wrote the following letter to Harvey Devereux :—

“ My dear Sir,

Upperwood, 18th April 1829.

“ It was the anxious wish of my poor father that
“ you should continue during your life to manage my
“ affairs as agent, in the same way as you did so many
“ years for him, at the same salary. His confidence and
“ esteem for you was evinced by the appointing you
“ trustee to his will, and desiring I should give you
“ the Cooldrina property. I have now to hope and
“ request you will continue my agent and manager of
“ my affairs, and I now appoint you to that situation
“ during your life, at the former salary of 200*l.* a year,
“ on the following conditions: that you shall faithfully
“ and attentively discharge the duties of such office,
“ and pay over and account to me at least once in
“ every year for all rents and other monies of mine
“ that may get into your hands; and as an inducement
“ to you to accept such, I promise not to remove
“ you, and if I shall do so without just cause at any
“ future time, I bind myself to allow and pay you that
“ salary.

“ I am, my dear Sir,

“ Yours very truly,

“ WM. DE MONTMORENCY.”

On the same day Edmond Smithwick, the brother-in-law of Harvey Devereux, brought to the house of William De Montmorency certain deeds of lease and release ready drawn and prepared for execution, the release bearing date the 18th of April 1829, and made between William De Montmorency of the one part and Harvey Devereux of the other part, whereby, after reciting that Sir William R. De Montmorency had directed and requested his son to give to Harvey Devereux the estate of Cooldrina, of the value of 100*l.* per annum late currency, in consideration of his faithful services, and in full discharge and acquittance of all dealings or accounts, claims or debts, between Sir William Ryves De Montmorency and Harvey Devereux, it was witnessed, that in consideration of such direction and the premises, and in consideration of 10*s.* paid by the said Harvey Devereux, the said William De Montmorency conveyed the said estate of Cooldrina to Harvey Devereux, his heirs and assigns. Shortly after the death of Sir William Ryves De Montmorency there was a strong rumour prevalent in the county of Kilkenny that Lord Crofton, who was a relation of the testator, and Lord Crofton himself declared, that he intended, as heir-at-law, to lay claim to the testator's estates at Upperwood.

On the 2d of June 1829 Harvey Devereux proved the will in Dublin, and two witnesses proved that Harvey Devereux, accompanied by William De Montmorency in a carriage, on their return home addressed the tenantry, where 500 persons were assembled, in a speech, wherein he said that he alone was possessed of a secret which would disturb the appellant in the title to his estates, but it should remain with him ; and

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if any persons claiming any right to the estates should go to law, he would take care to defeat them, as he was always successful in all cases in which he was concerned. Another witness proved that Harvey Devereux had told him that he knew of circumstances connected with the estates that would ruin William De Montmorency's claims or prospects in respect thereto, of which no other person was aware but himself. He also added, that William De Montmorency was not using him well, but at the same time he never would injure him. Harvey Devereux acted as the plaintiff's agent from the month of April 1829 till the month of December 1830, when his agency for the plaintiff ceased. On the 5th October 1830 the accounts between the plaintiff and defendant were the subject of negotiation. Messrs. Montgomery and Aicken were employed on behalf of the plaintiff, and Maher, the partner of the defendant on his behalf, to enter into an investigation of the accounts between them. At first the inquiry was not confined to the accounts subsequent to the decease of Sir William Ryves De Montmorency, though they were afterwards confined to those subsequent to his decease, as appears by the following letters written by Mr. Aicken :—

Dublin,

13th October 1830.

" My dear friend,

" I wrote to you again by last evening's post ;
" Mr. Smithwick, attorney, I hoped to have seen ere
" this ; I think on his arrival the mortgage will be
" executed. It appears clearly that all interest to and
" for the 1st November 1827 was included in the
" bond of that date, amount 1,570*l.* 16*s.* 8*d.* ; surely
" it will be easy to calculate the interest from that date.

" It is said that an account of same date was stated
 " and settled between the parties, and that it is in
 " your hands. Such would be satisfactory; bring it up
 " when you come, also the conveyance to you of
 " Cooldrina, in which, it is said, is embodied a general
 " release as between you and the present Mr. De
 " Montmorency. I pray of you by no means to omit
 " bringing up this deed, and, in a word, all such other
 " deeds, papers, and documents as relate to the
 " accounts, which I think (as I heretofore mentioned)
 " may be yet amicably and happily settled, on which
 " occasion my honourable, honest, and kind offers
 " shall not be wanting. I think it would be well if
 " you consulted Nixon on the subject matter of the
 " notice of which I sent you a copy in my letter of
 " yesterday, and know from him whether he will
 " consent to such submission of reference as therein
 " mentioned being entered into and executed; if not,
 " answers by you and Mr. De Montmorency must
 " be immediately given in. If possible, let me know
 " this by return of post, and in case of Nixon's
 " refusal endeavour to get his consent for three weeks
 " time for answering on the terms of appearing
 " and rejoining gratis, and not suffering a conditional
 " decree.

" Most truly yours,

" H. Devereux, esq.

SAMUEL AICKEN.

" I pray you to lose no time in coming up."

Hume Street,

" My dear Maher,

12th November 1830.

" I am authorized to say, that as Mr. Devereux has
 " agreed not to bring forward or make any charge
 " against Mr. De Montmorency for any money trans-

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“ actions or dealings which were had or took place
“ between Mr. Devereux and the late Sir William,
“ and that same shall be for ever done away with, that
“ he, Mr. De Montmorency, will accede to the
“ arrangement proposed this morning; I therefore
“ submit to you, that an entire new account should be
“ prepared on the part of Mr. Devereux, and be con-
“ fined to such money transactions and dealings as took
“ place between Messieurs Devereux and De Mont-
“ morency since Sir William's death, which account,
“ I should hope, may be made out, produced, gone
“ into, vouched, and finally settled on the meeting
“ appointed for to-morrow.

“ Most sincerely yours,

“ John Maher, esq.

SAMUEL AICKEN.”

After a laborious investigation of these accounts Mr. Montgomery, finding that they would occupy a considerable time, proposes to strike off above 500*l.* from the defendant's demand, and thereby settle all matters between them. To this proposal the defendant agrees, and more than 500*l.* is struck off from his demand; whereupon a deed, dated the 18th of December 1830, is made between Harvey Devereux of the one part and William De Montmorency of the other part, the draft thereof having been settled and being in conformity therewith, which witnessed, that all accounts of whatsoever nature or kind theretofore or then pending between them in relation to any dealings whatsoever had been and were then finally settled, as well those relating to such dealings or transactions as took place between Harvey Devereux and the late Sir William R. De Montmorency as those between Harvey Devereux and William De Montmorency; and that for peace

sake, as well as to avoid litigation and expense, William De Montmorency had agreed to secure to the said Harvey Devereux the principal sum of 2,700*l.* in full for the balance due on such accounts by two bonds, the one payable in three years at five per cent. per annum, and the other in five years at six per cent. per annum; and that the said Harvey Devereux thereby consented and agreed to accept said sum, it being, however, understood and declared that the said Harvey Devereux was to pay and discharge the amount of his two drafts or bills of exchange theretofore drawn upon and accepted by the appellant for the sums of 450*l.* and 400*l.*, which two bills had been passed by the said Harvey Devereux to the Provincial Bank in Kilkenny, and had not been paid when same became respectively due, and were then in the hands of Messrs. Pierce and David Mahony as attorneys for said bank, who had taken proceedings at law against William De Montmorency for the recovery of the amount thereof; and that said Harvey Devereux was also to pay whatever costs and charges might have been incurred upon said bills. And it was agreed by William De Montmorency that he would pay off and discharge all such just and legal demands upon the late Sir William R. De Montmorency as had not been discharged by Harvey Devereux, and credited to him in the accounts theretofore furnished by him to William De Montmorency, and examined by him and his solicitors; and that he would indemnify Harvey Devereux and his estates, real, freehold, and personal, against the payment of the same; and the said Harvey Devereux thereby undertook and agreed to save harmless and keep indemnified at all times thereafter the appellant of, from, and against all debts and other demands of

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whatsoever nature or kind which were set forth in the said Harvey Devereux's account, as had been theretofore paid off by him for or on account of the said late Sir William R. De Montmorency or the appellant, and at all times thereafter to aid and assist the appellant, if it should become necessary so to do, in resisting the payment thereof, if any demand should at any time thereafter be made in respect to the same. And the said Harvey Devereux thereby undertook, by deed or other instrument, as counsel should or might advise, to assign and make over to the appellant all and every the estates and properties devised and bequeathed by the will of the said Sir William Ryves De Montmorency unto the said Harvey Devereux as trustee or otherwise, save and except the lands of Cooldrina otherwise Backweston, situate near Leixlip, in the counties of Dublin and Kildare, which the appellant had theretofore conveyed to said Harvey Devereux, and the conveyance whereof he thereby fully and absolutely confirmed. And the said Harvey Devereux thereby also covenanted and agreed to allow his name, either as personal representative of the late Sir William Ryves De Montmorency, or, if necessary, notwithstanding such proposed assignment, as trustee in his will, to be thereafter used in such manner and for such purpose as it might be necessary, and as counsel should or might advise upon, on immediately afterwards being indemnified, in such manner as counsel might advise, against the consequences of allowing his name to be used; and also to give and afford to the appellant all information in his power at all times touching or relating to the estates and properties of the said late Sir William Ryves De Montmorency or of the appellant; and that the said Harvey

Devereux should, on the perfection of said bonds therein-before stated and the execution of that deed, hand over to the appellant all deeds and papers relating to the estates, properties, affairs, or business of the said late Sir William Ryves De Montmorency or the appellant, of which the said Harvey Devereux had possessed himself, save and except those relating to the lands of Cooldrina, and likewise give his assistance to enable the appellant to recover payment of all arrears of rent then due and owing out of the several estates devised to the appellant by the will of the said Sir William Ryves De Montmorency, save and except the lands of Cooldrina, and also such parts of the arrears of rent as were due and owing out of the estate of Kilcreene at the time of the said Sir William Ryves De Montmorency's decease, and that then remained due and owing thereout.

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The draft of the deed was approved of by Mr. Montgomery, but he declined witnessing the deed, because his own claims were not recognized, and because, the plaintiff not being satisfied with the arrangements, he thought by so doing he might bind William De Montmorency; and for the same reasons he prevented Mr. Malone, the then agent of William De Montmorency, from being an attesting witness. At the same time the deeds and papers in the hands of Harvey Devereux were, by the direction of William De Montmorency, handed over to John Robert Malone. In pursuance of the last-mentioned deed the bonds therein mentioned were executed by the plaintiff William De Montmorency. On the 16th November 1831 William De Montmorency writes to Harvey Devereux the following letter :—

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of attorney between William De Montmorency and Harvey Devereux, appointing him collector of his rents, and also a deed by which he gave him 200*l.* a year in case he discontinued him as his agent, and also a conveyance of the 1st of April 1829.

That in consequence of the impression made upon his mind by the said Edmond Smithwick, that the said Harvey Devereux could either take from or leave the said estates with him, the appellant executed said power of attorney, and said annuity deed, and said conveyance, dated the 18th day of April 1829, so produced to him, without receiving any consideration whatever for the same.

That he was grossly deceived and imposed on in said transaction, and was prevailed on to execute said annuity deed and said conveyance of said lands of Cooldrina by unfair means and practices used by and on behalf of the said Harvey Devereux; and the said Harvey Devereux having assumed the possession of said estates of said testator, and being in possession of all the deeds, papers, and writings relating to said estates, and refusing to put the appellant into possession of said estates unless he would execute said several instruments; and that he never gave any directions whatever or instructions to any person to prepare said power of attorney, or said annuity deed, or said conveyance of said lands of Cooldrina, nor were the same or either of them prepared by any person employed by or on behalf of the appellant, but said power of attorney, annuity deed, and conveyance were drawn or prepared by or under the order or directions or from the instructions of said Harvey Devereux, and said power of attorney and annuity deed and conveyance

were brought and produced to the appellant by said Edmond Smithwick ready drawn and prepared for execution.

That after the execution of said instruments the said Edmond Smithwick declared that the appellant had thereby made a friend of the said Harvey Devereux, who immediately after, but not until said deeds were actually executed, gave possession of said estates and properties, except said estate in the county of Dublin, to the appellant.

That Harvey Devereux had addressed the tenantry in a speech to the effect before mentioned.

That he continued the said Harvey Devereux his agent for a year and a half, when he found it necessary to discharge him from his agency ; and having done so, and thereupon a settlement of the said Harvey Devereux's accounts as his agent and on foot of various advances made for appellant having taken place, the appellant appeared indebted to the said Harvey Devereux in a sum of 2,700*l.* ; but such settlement of accounts was confined to those between the appellant and said Harvey Devereux as his agent from the time of the execution of the power of attorney so obtained as aforesaid to the discharge of said Harvey Devereux from the agency, and for sums of money received by the said Harvey Devereux since the death of said testator on account of rent due to testator in his lifetime, but did not contain any account whatever on foot of the personal estate or effects of said testator.

That the said Harvey Devereux thereupon required the appellant to execute the two bonds before mentioned, and also required him to execute the deed of the 18th day of December 1830.

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That the said last-mentioned deed and bonds were drawn up at the office of Messrs. Aicken and Montgomery, appellant's solicitors, who, perceiving that there was no settlement of accounts on foot of the rents received by the said Harvey Devereux during his agency with the said Sir William Ryves De Montmorency, or on foot of the assets of the said Sir William, declined to witness the execution of said deed, and would not permit John Robert Malone, appellant's then agent, to witness same.

That although the said deed purported to confirm the said conveyance of 18th April 1829, yet appellant submitted that said deed of April 1829 was not in any manner confirmed by said deed of 18th of December 1830, or did not operate as a release to said Harvey Devereux as executor of said testator, inasmuch as appellant executed same under the impression that the said Harvey Devereux had the power to invalidate his title to said estates, and inasmuch as he appeared then indebted to him in a large sum of money, for the recovery whereof the said Harvey Devereux threatened to take legal proceedings, and refused to give up the agency until paid; and appellant was then in very embarrassed circumstances, and the said Harvey Devereux was in possession of all the title deeds, papers, and writings relating to appellant's said estates, and all which he retained in his possession, except the tenant's leases of said estates in the county of Kilkenny; and inasmuch as the said John Smithwick, who was the father-in-law of the said Harvey Devereux, was then a creditor of appellant to a large amount on foot of said judgments, and to further secure which he compelled appellant to execute to him a mortgage of said estates

in the county of Kilkenny on the same day with said alleged confirmation ; and appellant submitted that said deed of the 18th of December 1830 should not be considered a release to the said Harvey Devereux as executor as aforesaid, inasmuch as no account was furnished previous thereto of the dealings between the said Harvey Devereux and the said Sir William Ryves De Montmorency in his lifetime, or on foot of the personal estate of said testator.

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That the said Sir William Ryves De Montmorency was entitled to a life estate in certain lands called Kilcreene in the city of Kilkenny, with remainder to William Bayley, esq., and that a large arrear of rent of said lands of Kilcreene was due to the said Sir William at the time of his death from solvent tenants, but the said Harvey Devereux, being also agent to the said William Bayley as well as to the said Sir William, either neglected to receive, or, if he received the rents thereof, never accounted for same to appellant; and that had the said Harvey Devereux used due diligence he might have received the whole of said arrear of rent, and the more especially as the leases of said life estate were in the possession of the said Bayley or Devereux, and both of whom were fully aware of appellant's right thereto.

That the said Harvey Devereux also permitted the said William Bayley to retain a considerable portion of the land called Deckeland, held by the said Sir William Ryves De Montmorency under the corporation of Kilkenny for a long term of years, although the said Harvey Devereux well knew appellant's right thereto; but being the agent of said Bayley he either received himself for his own use, or suffered said Bayley to

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receive, the rents of said last-mentioned lands since the death of the said Sir William in violation of the trusts reposed in him as the executor appointed by said will.

That having been so advised, he had lately paid off the said Smithwick the amount of said mortgage debt, with the view to his filing his bill to impeach said deeds, and which he could not sooner do under the circumstances therein-before stated.

That so well aware was the said Harvey Devereux of the impeachable nature of said transaction of the 18th of April 1829 that he had not made any claim on foot of said annuity of 200*l.* to be paid him on his being discharged from said agency.

That he had caused various applications to be made to the said Harvey Devereux for all deeds, papers, and writings relating to the property of the said Sir William, and which said Harvey Devereux by said instrument of 18th December 1830 undertook to give up to appellant; and that he also caused application to be made to the said Harvey Devereux to come to an account with appellant on foot of the personal estate and effects of the said Sir William Ryves de Montmorency deceased, and to re-convey said lands of Cooldrina, otherwise Backweston; with all which applications the said Harvey Devereux had declined to comply.

That the said Harvey Devereux combining, &c. pretended that he had settled all accounts on foot of the rents of said estates or otherwise during the lifetime of said testator, and also as executor of said testator; whereas the said appellant by his said bill charged that the said Harvey Devereux never accounted with the said Sir William in his lifetime, nor with him, save as

therein-before mentioned; and the said Harvey Devereux pretended that the said conveyance of said lands of Cooldrina was a good and valid conveyance, and that he was entitled to the benefit thereof, whereas the appellant charged the contrary thereof to be the truth, for the reasons therein-before mentioned.

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And it was by the said bill charged, that the said Harvey Devereux at other times pretended that the said Sir William in his lifetime was indebted to said Harvey Devereux in a large sum for costs, and that same formed part of the consideration of such conveyance of said lands of Cooldrina otherwise Back-weston; whereas the said appellant charged that Messrs. Aicken and Montgomery were the solicitors and attornies of the said Sir William in his lifetime, and that the said Harvey Devereux only acted as the attorney of the said Sir William in some trifling local matters; and that it was part of the agreement between the said Sir William and said Harvey Devereux that no charge whatever should be made by said Harvey Devereux for such costs, but that his acting as agent should be considered as compensation for same, and his salary was increased from 100*l.* per annum to 200*l.* per annum on that account.

And it was by the said bill further charged, that notwithstanding said agreement John Maher, who is the partner of the said Harvey Devereux as attorney and solicitor, in or about the 22d of March 1833 furnished a bill of costs, manifestly for business alleged to have been done for the said Sir William in his lifetime, and amounting to the sum of 576*l.* or thereabouts, and afterwards commenced an action against appellant in His Majesty's Court of Exchequer for the

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recovery of said costs ; and said appellant paid unto the said John Maher the sum of 135*l.* in discharge of said costs ; and the appellant by his said bill charged that said costs were furnished and paid, and the said action was brought, with the privity and for the benefit of said Harvey Devereux.

And the said appellant further expressly charged, that if any costs were due to the said Harvey Devereux by the said Sir William in his lifetime, that same formed no part whatever of the consideration of said deed of 18th April 1829.

And the said bill prayed for an account of the personal estate of Sir William R. De Montmorency possessed by the respondent, and of all sums received by the respondent belonging to the said Sir William or his estate, during the lifetime of the said Sir William, as his agent, and of said testator's debts and funeral expenses, and for the application thereof ; and that the clear residue thereof might be ascertained and paid to appellant ; and that it might be declared that the said deed of conveyance of said lands of Cooldrina of the 18th day of April 1829 and said annuity deed were fraudulent and void ; and that the said Harvey Devereux might be decreed to re-convey to appellant said lands of Cooldrina otherwise Backweston, and to come to an account of the rents and profits thereof received by the said respondent from the execution of said deed, and to pay over to appellant what should be found due to him upon the taking of such account ; and that he might release said annuity ; and that said deed of 18th of December 1830 might likewise be declared fraudulent and void so far as same purported to confirm said conveyance of 18th April 1829, or to release the

said respondent on foot of the accounts sought by the said suit; and that a receiver might be appointed to collect the rents of said lands of Cooldrina otherwise Backweston pending the suit.

Harvey Devereux by his answer stated, that the deeds were drawn up in conformity with appellant's directions, and were submitted by appellant before their execution to William Mannin, an attorney. He admitted that he gave to appellant no actual pecuniary consideration for the deed, but that in consideration thereof he consented to give up a claim to the amount of about 1,600*l.* for costs for business done as an attorney and solicitor for the testator in his lifetime, for which respondent had received no payment, and which he never afterwards claimed or charged in his accounts against appellant as residuary legatee or otherwise; but he denied that appellant was, as by bill most untruly stated, grossly or at all deceived or imposed on in said transaction, or that he was prevailed on to execute a letter by which he was appointed attorney and said conveyance of said lands of Cooldrina, or either of them, by unfair or any other means or practices used by respondent or by any other person, as he believed; and he admitted that he had acted as the attorney and confidential law adviser of Sir William R. De Montmorency in all local matters.

On the 7th of February 1837 the cause came on to be heard, when the Lord Chancellor of Ireland dismissed the bill, without costs. From this decree William De Montmorency appealed.

Mr. Tinney and Mr. Pemberton for the Appellant.—
All the accounts cannot be settled; the account between

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the respondent and the testator from 1821 to 1829, and his account as executor and as agent to the plaintiff, are unsettled, and yet the bill is dismissed. He pretends to a knowledge of a secret which may dispossess the plaintiff of his property, and uses the influence which he obtains from the possession of this secret and his knowledge as an agent for the purpose of inducing the plaintiff to sign a letter by which he appoints him his agent, and to execute a deed by which he gives him part of his estate ; and though the plaintiff only succeeded to 2,000*l.* a year out of 4,700*l.*, he receives the same salary as the testator gave him, being at the rate of ten instead of five per cent., and is appointed for life.

The deed cannot stand : it was prepared by the defendant, and executed four days after the death of the testator. It is stated to be in discharge of all accounts between the testator and defendant, as if a balance were due from the testator, the presumption being the other way. Dr. Cullinan must be interested in favour of the defendant, he himself having received a gift from the plaintiff ; and he mentions nothing of the settlement of accounts or of the appointment of respondent as agent. The defendant states, that he consented to give up 1,600*l.* costs, about which Dr. Cullinan says nothing, nor have they been proved to be due ; and defendant states that the deeds were submitted for approval to Mr. Mannin, but he has not examined Mannin as a witness, nor has he proved that they were so submitted. Plaintiff executed the deed under an impression that the testator had enjoined him to do so, and that 1,600*l.* was due for costs. There is no attempt to prove either of these circumstances. In 1830 the plaintiff was involved in debt.

The following cases were cited : the Earl of Chesterfield v. Janssen¹, Crowe v. Ballard², Murray v. Palmer³, Cann v. Cann⁴, Cooke v. Settree⁵, Horlock v. Smith⁶, Waters v. Taylor⁷, Lewis v. Morgan⁸, Roche v. O'Brien⁹, Dunbar v. Tredennick.¹⁰

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Mr. Knight Bruce and Mr. Goldsmid for the Respondent.—This is a bill to open accounts, not alleging any error, or any discovery of any fact not known in 1830 ; pressure is the only objection stated to the deed of 1830. Defendant alleges that every account and voucher was delivered up in 1830, and yet not one is produced, and no error is alleged, nor is there any ignorance. The letters written by the plaintiff show that he was aware of the transactions ; the speech was made in June after the first deed was executed. The defendant dismissed himself from the agency, and has never claimed nor does he now claim the annuity. In all the cases cited as to confirmation there was ignorance and pressure.

Respondent's
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LORD CHANCELLOR.—My Lords, this case has occupied so much time in the discussion, and has been discussed at such various intervals, that I have had an opportunity, since it was first opened, of carefully examining the whole of the proceedings and the evidence on each side. As the noble and learned Lord here present concurs with me as to the course your Lordships ought

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¹ 1 Atkins, 354 ; 2 Vesey, sen. 158.

² 2 Scholes and Lefroy, 486.

³ 1 Vesey and Beams, 126.

⁷ 2 Milne and Craig, 526.

⁹ 1 Ball and Beatty, 340.

⁸ Brown's C. C. 117.

⁴ 1 Pere Williams, 727.

⁶ 2 Milne and Craig, 495.

⁴ 4 Dow, 48.

¹⁰ 2 Ball and Beatty, 317.

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to adopt, there is no advantage in taking any further time to consider the case.

It is very important, considering the order that we shall have to propose to the House, and for the benefit of those who may not be conversant with the proceedings of the courts of equity, as the bar of Ireland are represented as not being, (I believe without any foundation, for I see no ground to suppose that the rules of courts of equity are not attended to there with great fidelity. I believe that the decisions of this House and the rules of courts of equity regulate their proceedings;) —but it is very important that all parties should have their attention called to the various parts of this case, that there may be no misunderstanding as to the grounds upon which this House proceeds in affirming the judgment of the Court below.

The transactions of 1829 are transactions that I cannot hesitate for a moment to say were highly suspicious at least, and such as, without much more explanation of them than has been afforded by the evidence in this case, could not possibly be supported by a court of equity, if a complaint had been made before any acts of confirmation had taken place.

We find that on the 14th of April 1829 the original proprietor of this property died, and we find that so early as the 16th it is stated that a conversation took place, in which the plaintiff stated that he had determined to part with the estate in the way in which he afterwards did; but as early as the 18th, four days only after the death of the original proprietor, we find a deed executed by which an estate, part of the property inherited by the plaintiff, is conveyed over to Mr. Deve-

reux, who had been the agent, and who represented that he had also been the confidential law adviser of the testator,—we find that that deed conveyed all the estate in discharge of all accounts which had been pending between the testator and himself.

Now the objections to that are very obvious: in the first place, the great haste with which it was done, and the relative situation of the parties, the one the manager of the property,—perfectly conversant, therefore, with all circumstances connected with the property, and who procures this conveyance to himself. It professes to be as a settlement of all accounts, although it was perfectly impossible, from the nature of the case, and from the circumstances that took place, that there could have been any examination of those accounts.

Then there is another fact, not brought out very distinctly in the evidence, but, as far as the evidence applies to it, giving rise to a strong suspicion of influence of a very improper nature exercised by the defendant over the plaintiff at that time, namely, the supposed possession of a secret by which, according to the representations of the witnesses, he thought he had the power of depriving the plaintiff of his estate;—some secret with regard to the title, which, if revealed, would show that the plaintiff had no title. Now, if that really existed, and if that really was used for the purpose of obtaining the conveyance of the estate, it would be as gross a fraud, and as violent a breach of duty on the part of the agent Devereux, as any thing that can possibly be stated.

The case upon this point stands in a very singular position, and the evidence is of a very extraordinary character. There is no evidence of such a representa-

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tion having been held out to the plaintiff; the evidence is of a speech made by this agent at a meeting of the tenants and inhabitants of the estate, upon the plaintiff making his entry and taking possession upon the death of the testator. He is there represented as having stated publicly that he was in possession of a secret,—that the heir-at-law would not succeed, who evidently had been making some inquiries, probably with a view of making some claim. The agent is represented as having stated publicly, that he was in possession of a secret by which the plaintiff's title might be defeated, but that that secret he would keep to himself; and that, as he was so fortunate as to succeed in all contests in which he was engaged, no danger could arise to the plaintiff. Now that is stated by witnesses; two witnesses speak to having heard the speech delivered, and another witness speaks to similar expressions having been used at different times.

My Lords, I do not see what possible motive there could be,—none has been suggested at the bar, and I am unable to suggest to myself any possible motive for that declaration. If, indeed, there was no foundation for it, of course, in addition to the objection of its being a falsehood, it was a gratuitous slur upon the title of his employer; because, if there was no objection known to him to the plaintiff's title, one cannot conceive any thing more absurd or injurious to the plaintiff's interest than proclaiming that there was, although nobody was likely to find it out. On the other hand, if he was possessed of this secret, and nobody else knew it, one cannot conceive any folly greater than to say, at a meeting of 500 persons, that there was an objection to the title, leaving all those persons to find it out;—an

objection which might probably become known to those who might be affected by the failure of the plaintiff's title. However, there is no distinct evidence of this having been used as a means of obtaining the deed, though there are strong suspicions that it might have been.

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Now all these circumstances, although not amounting to positive proof of fraud, yet are so full of suspicion that, considering the situation in which the parties stood towards each other, and considering the haste with which the deed was prepared and executed, and considering what was stated to have passed, I think, if the transaction had been complained of within a reasonable time no court of equity could have hesitated in setting aside these transactions, unless a very different explanation had been given of them than that which has been afforded in this suit. But, however, it must be observed, that there is no positive evidence of fraud; there is no distinct evidence of misrepresentation, or of influence used by the possession of the secret, although there is very strong suspicion that each of these acts might have been brought to bear; as means of obtaining the deed in question.

All those facts, however, were of course known, or might have been known to the plaintiff himself; and that which appears extremely suspicious upon the face of the transactions as they stand might have been capable of explanation, or there might have been a knowledge of circumstances which would lead those who were acquainted with all the facts to a different conclusion from that to which they might have been led by the mere circumstances of suspicion to which I have alluded; for instance, the plaintiff must have known

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whether the supposed secret as to his title was or was not used as a means by which the deed of 1829 was obtained. He knew or had the means of knowing, or those whom he employed had the means of knowing, what was the state of the account between the father and Mr. Devereux; and if they did not think proper to use those means in their power, those that suffer by their negligence ought not to be heard to complain.

My Lords, the subsequent transactions are of a character which seem to me to render it perfectly impossible for a court of equity to open the transactions of 1829, if there be such a doctrine in a court of equity as that confirmation will make that valid which in its origin was voidable (though not void) upon grounds for equitable interference.

My Lords, this deed was executed in 1829. It appears that this deed beyond all doubt operates, as long as it stands, as a conclusive settlement of accounts. Whether those accounts were investigated or not, is not material for the purpose, because the deed, so long as it stands, is a conclusion of all question of account anterior to the death of the father: such are the terms of it. It appears that so early as in the month of October 1830,—whether upon the application of the plaintiff, or whether by desire of the defendant, is matter of some doubt upon the evidence,—there was a negotiation going on between the defendant and the then solicitors of the plaintiff. The plaintiff was then represented by Messrs. Montgomery and Aicken; Mr. Maher, being the partner of the defendant, was the party negotiating on his part, and Montgomery and Aicken were the parties negotiating on the part of the plaintiff.

My Lords, it appears that this was not done in haste; there was ample opportunity afforded of making inquiry into all the circumstances that were material to be inquired into as to the transaction of 1829. It appears that the negotiation commenced on the 5th day of October 1830, and the first object was an investigation of the accounts between the defendant and the plaintiff. In the first instance it does not appear that the inquiry was confined to accounts subsequent to the death of the father; there was a general inquiry how matters stood between the plaintiff and the defendant, and it is to be observed that, inasmuch as the plaintiff was residuary legatee of the testator, any item of account as between the defendant and the testator would be immaterial in a final settlement of account between the defendant and the plaintiff; because, whatever the defendant owed to the estate of the testator would, under the circumstances that have taken place, namely, the plaintiff being residuary legatee of the testator, be an item of account between the plaintiff and the defendant.

Now, Mr. Maher tells us, that in the month of October 1830 he, on behalf of the defendant, and Montgomery and Aicken, on the part of the plaintiff, came to this investigation of the accounts; and the letters, which are extremely important, of the 13th of October and the 12th of November 1830, which have been relied upon in reply on behalf of the appellant, appear to me to be extremely important evidence on behalf of the respondent. The first is the letter of the 11th of October, signed "Samuel Aicken," one of the parties acting for the plaintiff: he says, that Mr. Maher, who is the person acting on behalf of the defendant, had not been

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able to come to any conclusion with respect to the accounts; these, no doubt, are the accounts between the plaintiff and the defendant, that leave it ambiguous, except that the accounts had been the subject of discussion between Aicken and Maher.

Then, on the 18th of October, the same person writes to the defendant himself, in which, after alluding to another matter with regard to the mortgage, he says, "Bring up with you the conveyance of the Cooldrina estates, in which, it is said, is embodied a general release as between you and the present Mr. De Montmorency. I pray of you by no means to omit bringing up this deed, and in a word all such other deeds, papers, and documents as relate to the accounts which I think (as I heretofore mentioned) may be yet amicably and happily settled; on which occasion my honourable, honest, and kind offers shall not be wanting."

Now, that of course accordingly must have been done; there is no evidence of its being done, but he asks for information, and we must assume that the deeds relating to the Cooldrina estate were produced, which it had become material, in the investigation of the account between the plaintiff and the defendant, should be brought up, in order that Mr. Aicken, acting on behalf of the plaintiff, might see how far it was material in that settlement of account which he was making on behalf of the plaintiff, and which settlement of account necessarily depended upon the state of the accounts between the defendant and the estate of the plaintiff's father. This, therefore, proves that the attention of the legal advisers of the plaintiff was distinctly called to that

deed, which deed is material for the present purpose, as it operates as a settlement of account up to the death of the father.

Now, it appears from the evidence of Mr. Montgomery that the account subsequently investigated was confined to the transactions after the death of the father. It naturally would be so, unless those who were then advising the plaintiff thought that there was a case for setting aside the transactions of 1829; because, from the fact of the transaction of 1829 barring all inquiry as to the antecedent accounts, if they had thought there was a case in which it was the interest of their client to open the accounts antecedent to 1829, then was the time, when it was their bounden duty to inquire into the transaction of 1829; and if they thought there was any case which justified them in advising the plaintiff to question those transactions, that was the period when proceedings ought to have been instituted for carrying that object into effect. Instead of which, being furnished with a deed that closed the transactions up to the death of the plaintiff's father, his legal advisers, with full knowledge of that deed of 1829, proceed to investigate the accounts subsequent to the death of the father, making no inquiry, as far as appears, as to the antecedent accounts as between the plaintiff and the defendant. It cannot be supposed that they were so negligent of their duty, or so inattentive to the interests of their client, that they did not inform themselves what the history of that transaction was, and what the nature of that account was. It was their bounden duty to do so, and we may presume that they did so. It is due to professional men to suppose that they did attend to the interests of their client, and that they satisfied themselves

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that what they were doing for their client was what it was for his interest to do.

Then, in the subsequent history of these transactions Mr. Montgomery, acting for the plaintiff, goes on, and a laborious investigation of the subsequent accounts takes place. He then tells us, that, finding this extremely troublesome, and that it would occupy a considerable time, he said, "If you strike off 500*l.* from the accounts, that will leave 2,700*l.* due from the plaintiff to Mr. Devereux; that it shall be taken as the final balance." That is accepted; and I assume, as there is nothing else to which it could refer, that that is the proposal referred to in exhibit M.,—a letter written by Mr. Aicken, in which he says, "I am authorized to say, that as Mr. Devereux has agreed not to bring forward or make any charge against Mr. De Montmorency for any money transactions or dealings which were had or took place between Mr. Devereux and the late Sir William, and that same shall be forever done away with, that he, Mr. De Montmorency, will accede to the arrangement proposed this morning." Whether this refers to that proposition of Mr. Montgomery or any other, is not material. The subsequent account, it is admitted on all hands, is not matter of contest in this suit, but a certain sum was agreed upon as the final balance due from the plaintiff to Mr. Devereux, upon the assumption that the deed of 1829 operated as a final conclusion between the parties as to all transactions anterior to the death of the father.

My Lords, accordingly a deed was prepared, and we have the draft; and the draft of the deed, in conformity with that which had been settled, states, "That all

“ accounts of whatsoever nature or kind heretofore or
 “ now pending between them in relation to any deal-
 “ ings whatsoever have been and are now finally settled,
 “ as well those relating to such dealings or transactions
 “ as took place between the said Harvey Devereux and
 “ the late Sir William De Montmorency baronet, as
 “ those between said Harvey Devereux and said Wil-
 “ liam De Montmorency; and that for peace sake, as
 “ well as to avoid litigation and expense, said William
 “ De Montmorency has agreed to secure to the said
 “ Harvey Devereux the principal sum of 2,700*l.*, in
 “ full for the balance due on said accounts, by two
 “ bonds.”

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This is in October 1830, when there had been ample time to review the transactions of the preceding year, when there was no haste in the conclusion of the transaction, when the plaintiff had the advice of the professional persons whose names I have mentioned, when their attention had been drawn to the transaction of 1829; and, assuming they were not parties to any conspiracy against their client, which is not suggested, but that they were doing their duty towards the person on whose behalf they were acting, they had deliberately come to a ratification of that which had taken place in the preceding year, and Mr. Montgomery approves of that draft on behalf of his client. He therefore tells his client by that approval, I have done my duty towards you; I have investigated all the transactions which concern the account between yourself and Mr. Devereux, which necessarily included the transactions of the period anterior to the death of the father, as well as those subsequent; I approve of this draft on your behalf, and I, as your legal adviser, sanction your

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executing that deed, which upon the face of it recites a settlement of all accounts, as well those anterior to the death of the father as subsequent.

Now, my Lords, if the transaction were actually void in itself, there can be no confirmation of a transaction void in itself. But a transaction voidable only from circumstances of suspicion, however strong, may undoubtedly be confirmed by a subsequent deliberate act of the party who might originally probably have succeeded in having it declared void. It was subsequently investigated; it was subsequently considered by the party's professional advisers, and with their assistance, and with all due deliberation, he came to the conclusion that it ought to be confirmed.

Now, that deed contains a confirmation in terms of the conveyance of Cooldrina; it is necessarily part of the transaction to confirm the agreement. At the same time it must be observed, that it is introduced in this deed as an exception from the undertaking to convey other estates. The defendant, being trustee of the estates, upon this final settlement for the cestuique trust having claimed security for what he conceived to be due to him, he undertakes to denude himself of the trust, and to put into possession of the legal title that cestuique trust for whom he held the legal estates; and he therefore covenants to convey the estate, excepting that estate of Cooldrina, and he agrees to give up the deeds, except the deeds of Cooldrina. It is not, therefore, foisted into the deed merely for the purpose of confirmation, but it is a necessary exception out of that covenant which the defendant was necessarily called upon to execute when he came to the final settlement between himself and the plaintiff. But there is not

only a settlement of the accoutns anterior to the father's death, but the conveyance of the estate is now proved to be brought under the attention of the plaintiff's legal advisers, and with their concurrence and with their advice he confirms it.

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My Lords, it would be extremely difficult under these circumstances, if nothing more had taken place, unless he had said, you Messrs. Montgomery and Aicken have conspired with the defendant, and you have imposed upon me, and induced me to execute this deed in confirmation of a prior transaction. If that had been the case he had attempted to make, one could have understood it; but how, with the concurrence of Messrs. Montgomery and Aicken,—how, coming forward with them and employing them as his legal advisers, he can repudiate this deed of 1830, has appeared to me from the first to be a matter which involved the plaintiff in a difficulty that was perfectly insurmountable.

But there is another circumstance which proves that this was not done behind the back of the plaintiff, or without his knowledge and concurrence, but that he was perfectly privy to what was going on under the immediate direction, no doubt, of his legal advisers,—but at the same time communicated to him, and his concurrence asked, and that is the tenor of the subsequent letters. It is not that any letters subsequently written can add to the validity of a transaction formerly entered into, as in that deed of 1830, but the value of these subsequent letters is, to show that the plaintiff clearly understood what he had done, and that for a considerable time after that period he never questioned the propriety of the transactions into which he had

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entered. On the 10th of November 1831 he is called upon, (it being part of the transaction of 1830 that Mr. Devereux had brought certain debts to account in his transactions with the testator,) he was called upon to show that such investigation of those transactions had taken place as exonerated him from being liable to the payment of those debts. There were certain debts excepted, which he had not taken credit for, and other debts he had taken credit for, and was bound to see to the payment of them.

There is a letter of the 16th of November written by himself to the defendant, in terms not of hostility, but the contrary, and so far consistent with the case made by the appellant; and in this letter of the 16th of November 1831, which he addresses "Dear Harvey," he states that he has been called upon to pay a debt, and he states, "By the deed executed between you and me "you undertook the payment of all debts due of my "late father, except certain debts in and on the back of "the said deed excepted." Therefore he tells him that he Devereux was to be looked to, and not the plaintiff, for the payment of that debt. Now, after this can it be said that he did not know what he had done, or that knowing what he had done he had no intention of confirming it?

The next letter is also undoubtedly open to the observation which has been made upon it; it may have arisen from the continued pressure of Mr. Devereux upon the plaintiff, but there is no such thing proved at that time. That letter in terms recognizes the transaction, but it also proves this,—indeed it is apparent upon the face of the whole transaction,—that it was not merely in consideration of the balance supposed to be

due at the time of the father's death, but that it was partly on account of the settlement of the accounts, and partly stated to be in consideration of a wish which the plaintiff's father had expressed that he would convey to Devereux the estate in question. He says, "some evil-minded person has told you lately that I repented giving you Cooldrina. I can assure you I never did say so; no, neither did I ever repent giving it to you, and whoever told you so told you a great falsehood."

My Lords, that brings it down to October 1832. Then there is a transaction which has been adverted to, and which is in evidence, of a later date, namely, the transaction of April 1833; because here we find the plaintiff and the defendant in opposition to each other. Mr. Maher, the partner of Mr. Devereux, brings an action for a bill of costs. That is not a very friendly proceeding, and it was not likely, therefore, that under those circumstances there should be any very kindly feeling between the parties; nor was it very likely that the plaintiff should be then acting in what he did under any influence of fear as to what the defendant might do with regard to the title of the estate. It might have been a very improper proceeding, and certainly was a very improper proceeding on the part of the plaintiffs in the action, because they were then claiming costs due to them from the plaintiff's father which had been the subject of arrangement long before, and their title to which they had deliberately relinquished. But who is it that sets up the benefit of the settlement of 1829? Why, the plaintiff himself. He says, You are calling upon me to pay costs, which costs by the transaction of 1829 you have waived all title to. He is the party who

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in 1833 was claiming the benefit of this arrangement. Whatever ambiguity there may be in the language of Mr. Maher's deposition, the result, as I understand it, is, that the plaintiff, then the defendant, set up this defence, and got the benefit of this defence, and he was accordingly protected from all costs incurred in the lifetime of the plaintiff's father, and due from the plaintiff's father to Mr. Devereux and Mr. Maher. Whatever costs there might be due to Mr. Maher individually, is not the subject of the claim of Mr. Devereux, but that, so far as regarded the costs due to the partnership of Devereux and Maher, the plaintiff got the benefit of that defence. Having set up the arrangement of 1829, which he now impeaches, he got the benefit of it, and was relieved from the costs incurred in the lifetime of his father. That took place in 1833, and nothing more is heard of this complaint of the transaction of 1829 until a bill is filed in 1835.

My Lords, having gone through the history of this transaction, and shortly called your attention to the periods at which the circumstances of the case must have been matter of investigation by the plaintiff, and the mode in which upon those occasions he has dealt with these facts, showing that, in 1829, in every subsequent transaction he has recognized what had taken place, that he has confirmed it, and acted upon it in the years 1831, 1832, and 1833, and never complained of it till 1835; it appears to me that, although the transaction was questionable in its origin and suspicious in its commencement, it is not now capable of being complained of; that, therefore, it will be the duty of your Lordships to confirm the decision of the Court below.

My Lords, the Court below dismissed the bill without costs; and I think they did right, because, however transactions may be confirmed, if they have their origin in circumstances so suspicious, as between a client and a solicitor, as these transactions were in their origin, I think that if the solicitor or agent ultimately escapes, by confirmation on the part of his client, in preventing those transactions being entirely set aside, he never can complain of being put to the cost of having those transactions investigated. The same ground, therefore, which induces me to think that the Court below did right in dismissing the bill without costs, induces me to submit to your Lordships that this decree should be affirmed, but that it should be affirmed without costs.

There is one other part of the case to which I wish to call the attention of the counsel for the appellant, which is, to that letter undertaking to pay a salary of 200*l.* a year. It does not appear that that now is of any value to the parties. Whatever, therefore, your Lordships may think right to do with reference to that letter would not make any difference as to the costs; at the same time it is a contract which, under these circumstances, undoubtedly ought never to have been taken. It appears to have been left in the hands of Mr. Devereux; and, if the plaintiff therefore requires it, I will submit to your Lordships that the decree should direct the document to be delivered up. It can make no difference as to the costs below or as to the costs here.

LORD WYNFORD.—My noble and learned friend has gone so fully into this case that it is scarcely necessary for me to say more than that I concur with him. I will, however, trouble your Lordships with one or two

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observations. There is no dispute here as to any question of law. There is no doubt that the transaction did not render the deed altogether void, but merely voidable, and being voidable it may certainly be confirmed by what took place afterwards. If the deed of 1829 was executed (which probably there may be some reason to suspect) under the supposition that the defendant was in possession of some secret which he might use for the purpose of defeating the plaintiff's title to the estate, a fear of that sort, arising from a threat on the part of the defendant, would invalidate any transaction that took place under the influence of that fear. I would state, however, that there is no evidence of any threat on the part of the defendant to make use of any knowledge which he might possess for the purpose of injuring the plaintiff; on the contrary, it is admitted on all sides that, although it is said by some of the witnesses that he boasted that he was in possession of this secret, he uniformly said that he would keep it within his own breast, and that he would never use it to injure the plaintiff.

My noble and learned friend has stated, that upon another occasion, besides what took place at the bonfire meeting, he alluded to this secret. What he said at the bonfire meeting is, as it is represented on the part of the plaintiff, very extraordinary, and it is scarcely possible to believe that it can be true. It is material to observe that the defendant gives a very different account of what he said at the bonfire meeting. On the part of the plaintiff it is stated, that the defendant said he could at any time, by disclosing the secret, defeat the plaintiff's title. What could possibly have induced him to say any such thing one cannot conceive, but, according to his own account, what he did say

was very different from what he is represented to have said by the evidence given on the part of the plaintiff, for he states in his answer that what he did say was: that it would be useless for my Lord Crofton to bring forward his claim as heir-at-law, as he was in a condition to disprove that claim. Now, if he said that, certainly it was sufficient to produce the effect which he says he intended to produce, to prevail upon the tenants of this estate not to be frightened at any claim set up by Lord Crofton. But notwithstanding this, unquestionably what my noble and learned friend has said is very true, that on the very day of the funeral of Sir William De Montmorency something at least very indelicate was said on the part of the plaintiff, if not exciting very great suspicion, in this affair, of his endeavouring to get possession of this estate conveyed to him, and also as himself being the attorney who was to prepare the deed himself, and writing that very extraordinary letter, by which 200*l.* a year was to be secured to himself; and I quite agree with my noble and learned friend that if proceedings had been instituted to set aside this deed,—the deed which followed upon that conveyance,—it seems to me impossible that that deed or that that letter securing the 200*l.* a year could possibly have stood. Therefore I say, if the transaction had ended with the deed executed in 1829, it appears to me it could have been set aside. But the question is, has that deed which was only voidable, been confirmed by that which has subsequently occurred? Now, the deed of 1830 is certainly a direct confirmation of it, as strong confirmation as it is possible to be. In that deed it is stipulated that all securities belonging to Sir William's property should be delivered up, except the deeds relating to the estate

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of Cooldrina. Why were they not delivered up? Because the estate of Cooldrina by the deed of 1829 had been conveyed by the plaintiff to the defendant. It would, therefore, have been improper to deliver up those deeds, because those deeds were the muniments of the property which had by the previous transaction, so confirmed by this, become the property of the plaintiff. But that is not all: then follow two letters in 1831 and 1832, and the subsequent transaction in 1833. By the first of those letters in 1831 he claims to take advantage of this very deed, which he now attempts to set aside; and then in the second letter in 1832 he says, he never since the execution of the deed of 1829 had said one word to the effect that that deed had been improperly obtained; quite the contrary, he never thought of it, and that that man must have spoken falsely who had ever conveyed to the mind of the defendant the idea that he ever thought that deed void.

Now, it strikes me, that, supposing an undue impression to be excited in a man's mind, it is often difficult to prove the precise time when that improper impression was got rid of. But a circumstance had taken place, before the writing of either of these letters, which clearly showed that that impression must have been got rid of before that time; both these parties were desirous of putting an end to the connexion with regard to the agency of the estates. Now, if that impression had continued in the mind of the plaintiff, that the defendant was in a condition to take that estate from him, or to enable any one to take that estate from him, whenever he thought proper, would he not, upon any terms whatever, have kept this person still in his employment? But it appears that the one was desirous of quitting

the employment, and that the employer was desirous of getting rid of him. Now, this clearly shows that all fear on the part of the plaintiff must have been got rid of at that time. Yet after this he writes the two letters which your Lordships have heard; therefore, whatever suspicion there may be with respect to that which took place in 1830, as to the continuance of this fear as to the title to the estate, it is clear that that impression must have been got rid of before the writing of either of the letters in 1831 or 1832, for before either of those letters was written all connexion whatever had been terminated between the plaintiff and the defendant.

But, I must say, with respect to the deed of 1830, it seems to me, that if that deed were to be set aside, as was very properly said by one of the counsel at the bar, I do not know what deed is to stand. There is no particular error pointed out; matters were investigated before this deed was executed; there was no want of legal assistance; it seems to me, on the contrary, that if there was any thing to complain of, there were rather too many present; there were a great number of attornies present, some concerned for one party, and some concerned for another; and it is positively sworn that all parts of the transaction were minutely and thoroughly investigated before the deed was executed. It appears to me that if this were to be set aside, no transaction which takes place between man and man could be considered as final, but parties must be forever exposed to have transactions ripped up in a court of equity, if these accounts are not to be considered as void, closed under this agreement which took place in 1829.

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I therefore, my Lords, agree with my noble and learned friend, that the decree of the Lord Chancellor of Ireland in every part ought to be affirmed. It is undoubtedly the practice, that where an appeal is made against a decree, and the judgment of the court below is affirmed, that appeal ought to be dismissed with costs; but I think, with my noble and learned friend, that this case forms an exception to that general rule,—that there is so much to blame in the conduct of this defendant, in the beginning and up to the year 1829, that the plaintiff was fully justified in appealing to the Court of Chancery in Ireland, and even in coming to this House, to have the matter thoroughly investigated. Under these circumstances it appears to me, that it would be hard and unjust to visit such a plaintiff, who is acting under such circumstances, with costs. I therefore concur with my noble and learned friend, in thinking that this appeal should be dismissed without costs.

With respect to that instrument to which reference has been made, undoubtedly it ought to be given up, though it was distinctly stated, as understood on both sides at the bar, that that instrument, wretched instrument as it is, was not intended to be carried into execution. I am glad that the party had so much modesty and moderation as never to attempt to carry it into execution; it never has been executed; nothing has been attempted to be obtained upon it, but the party is afraid that there may be bounds to that moderation, and that the period may come when he may be in danger of being called upon for the payment of that sum of 200*l.* per annum; and it is certainly extremely proper that he should have full security against any danger of that sort.

Mr. Tinney.—If your Lordships please, we would have an order to deliver up that instrument; I dare say the parties will give it us.

Mr. Goldsmid.—If it is in our possession. We do not know that it is.

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LORD CHANCELLOR.—The decree will be varied by directing the letter of April 1829 to be delivered up, and the rest of the bill to be dismissed, without costs.

It is ordered, That the said decree be varied by directing that the letter of the appellant to the respondent, referred to in the proceedings in this appeal, and dated the 18th of April 1829, be delivered up by the respondent to the appellant, and that in all other respects the said decree be affirmed.

[13th, 17th, 18th, and 20th February, and 7th May, 1840.]

(From the Court of Chancery, Ireland.)

DUDLEY PERSSE Esquire and FRANCES PERSSE otherwise BARRY his Wife, DUDLEY PERSSE the younger, KATHERINE HENRIETTA PERSSE, MARIA PERSSE, RICHARD DUDLEY PERSSE, and ELIZABETH PERSSE, Infants, by the said DUDLEY PERSSE, their Father and next Friend, Appellants.

ROBERT PERSSE, ROBERT HENRY PERSSE, the Honourable JOHN PRENDERGAST VEREKKER, JAMES LAMBERT, Sir JOHN BURKE, ANTHONY RICHARD BLAKE, JOHN MARTYN, and the Earl of Rosse, Respondents.

It is not competent for a defendant, failing in the defence made, by his answer to set up another defence dependent upon matters of fact not put in issue by his answer, and which the plaintiff has no opportunity of disproving or explaining.

Robert Persse being heir presumptive to R. P. Persse, who was then supposed to be a lunatic, and being under an apprehension that unfair means might be resorted to, in the then state of mind of R. P. Persse, to deprive the family of the succession to the estate, agrees with his eldest son, Dudley Persse, that D. Persse should sue out a commission of lunacy against R. P. Persse, and carry on such other suits and law proceedings as should be

necessary, in the name of Robert Persse, at the expense of Dudley Persse; in consideration of which agreement, and natural love and affection, R. Persse covenants that after the death of R. P. Persse the estates which should thereupon descend to him should be conveyed to himself for life, remainder to his son for life, with remainder to his first and other sons in tail male. The son, at his own expense, and in the name of his father, sued out the commission under which R. P. Persse is found a lunatic, who soon afterwards dies; whereupon the father succeeds as heir to the lunatic's estates. Upon a bill filed by the son to carry into effect this agreement, specific performance decreed, and held that the agreement was not voluntary, void for champerty or maintenance, or illegal, either for want of mutuality, or as being a fraud upon the great seal in lunacy; and considering the ages and situations of the parties, the father being sixty-two and the lunatic forty, and the objects to be gained by the prosecution of the commission of lunacy, that the consideration for the deed was not inadequate; but that deeds for carrying into effect family arrangements are exempt from the rules which affect other deeds, the consideration being composed partly of value and partly of love and affection.

THE respondent, Robert Persse, being tenant for life of the Roxburgh estate, situate in the county of Galway, with remainder to his eldest son, the appellant Dudley Persse, in tail, by settlement of the 1st May 1823, conveyed the same to Dudley Persse in fee, subject to an annuity of 800*l.* payable for his own life, the payment of his debts amounting to 17,000*l.*, and to a charge of 6,000*l.* for portions for his younger children. The yearly value of the Roxburgh estate was about 4,500*l.*, and the consideration for the deed was fixed by the stamp office at the sum of 29,250*l.*

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By settlement dated the 11th of November 1826, and made in contemplation of a marriage, which was afterwards had, between Dudley Persse and Katherine O'Grady, the daughter of the Chief Baron of the Court of Exchequer in Ireland, Dudley Persse, being seised in fee of the Roxburgh estate under recoveries suffered in pursuance of the deed of 1823, conveyed the same to trustees, (subject, in common with several other lands, to the annuity of 800*l.*.) to Dudley Persse for life, with remainder to trustees to preserve contingent remainders, and after providing an annuity by way of jointure for Katherine O'Grady, and 10,000*l.* for the portions of younger children, to the first and other sons of the said Dudley Persse in tail male.

In 1827 the respondent Robert Persse, being then of the age of sixty-five, was heir presumptive to Robert Parsons Persse, then of the age of forty; and in the event of Robert Parsons Persse surviving the respondent Robert Persse, the appellant Dudley Persse would have been the presumptive heir of Robert Parsons Persse. Robert Parsons Persse, who was then supposed to be a lunatic, was seised in fee of the Castleboy estate in the county of Galway, which was of the value of about 2,000*l.* a year. Apprehensions being at that time entertained that unfair means might be resorted to, by persons taking advantage of the state of mind of Robert Parsons Persse, for the purpose of depriving the family of the succession to the Castleboy estate, and the respondent Robert Persse having expressed a wish that the Castleboy estate, which had formerly belonged to his family, should be re-annexed to the Roxburgh estate, it was agreed between the appellant Dudley

Persse and the respondent Robert Persse, that a commission of lunacy should be sued out against Robert Parsons Persse, in the name of Robert Persse, at the cost and expense of Dudley Persse. Robert Persse had been a bankrupt, and had not the necessary means for prosecuting the commission. Under these circumstances a deed, of the 8th day of December 1827, was executed by Robert Persse of the one part and Dudley Persse of the other part, whereby, after reciting that Robert Persse would, after the decease of the said Robert Parsons Persse intestate and without issue, be entitled to the remainder or reversion in fee simple of the Castleboy estate, as heir-at-law to the said Robert Parsons Persse, and that the appellant Dudley Persse had agreed, at the request of his father, to sue out a commission of lunacy against Robert Parsons Persse, and to institute and carry on such other suits and law proceedings as should thereafter become necessary, in the name of the said Robert Persse, if necessary, and at the sole and entire expenses and charges of him the said Dudley Persse; It was by the said indenture witnessed, that in pursuance and execution of the said agreement, and for and in consideration of the natural love and affection which Robert Persse bore to his son Dudley Persse, and in further consideration of the sum of 10s. to Robert Persse paid by Dudley Persse, Robert Persse did for himself, his heirs and assigns, covenant and agree with the appellant Dudley Persse, his heirs and assigns, that from and after the decease of the said Robert Parsons Persse the Castleboy estate should be conveyed and vested in Robert Persse for life, and from and after his decease be conveyed for the same

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uses, estates, and limitations as the Roxburgh estate stood settled; and there was a covenant upon the part of Robert Persse for further assurance.

On the 22d April 1828 Dudley Persse at his own expense caused a commission of lunacy, upon the petition of Robert Persse, to be sued out against Robert Parsons Persse, who, after an inquiry which lasted fifteen days, was found a lunatic. On the 25th of October 1829 Robert Parsons Persse died, and an ejectment being brought by a person claiming under the will of the lunatic, the jury upon the trial found a verdict against the claim set up by the will; and thereupon Robert Persse entered into the possession of the Castleboy estate, which had descended to him by the death of Robert Parsons Persse. Dudley Persse, independent of what was allowed him out of the lunatic's estate for the costs incurred in the lunacy, paid the sum of 295*l*.

In the year 1829 Katherine Persse, the wife of Dudley Persse, died, leaving the appellants, Dudley Persse the younger, Katherine Henrietta Persse, and Maria Persse, the children of the marriage between herself and Dudley Persse.

By indenture of the 9th day of June 1830, executed by Robert Persse of the first part, the respondent, the Earl of Rosse, of the second part, and the respondent Robert Henry Persse, the second son of the said Robert Persse, of the third part, after reciting that Robert Persse was seised in fee simple in possession of the estate of Castleboy, and reciting that the said respondent Robert Persse did, by indenture bearing date on or about the 1st day of May 1823, fully and sufficiently provide for and advance his eldest son, the

appellant Dudley Persse, and that Robert Persse was desirous of settling the remainder in fee of the Castleboy estate on Robert Henry Persse, his second son, on the terms therein-after specified, and to vest in possession on the demise of him, Robert Persse; and Robert Henry Persse agreed to purchase the same on such terms as were therein-after expressed; it was witnessed, that in pursuance of the agreement, and in consideration of 16,000*l.* sterling to him, the said respondent Robert Persse, secured by the bond, with warrant of attorney for confessing judgment thereon, of Robert Henry Persse, bearing equal date therewith, Robert Persse conveyed the Castleboy estate to the Earl of Rosse and his heirs for ever, upon trust for Robert Persse for life, and after his decease in trust for Robert Henry Persse, his heirs and assigns for ever; and reciting, that the said sum of 16,000*l.*, so secured by the said bond and warrant of Robert Henry Persse, was thereby made payable to the executors, administrators, or assigns of Robert Persse on the expiration of twelve months after Robert Henry Persse, his heirs or assigns, should have been put into the actual and lawful and peaceable possession of the said lands and premises thereby conveyed and assured, with interest thereon at the rate of 5*l.* per cent. per annum from the day of the death of Robert Persse, it was thereby further agreed between Robert Henry Persse and Robert Persse, that Robert Henry Persse would, on the expiration of twelve months from the day when he should obtain the actual possession of the said lands and premises thereby conveyed, pay unto Robert Persse, his executors, administrators, or assigns, the said sum of 16,000*l.*, and in the meantime would pay to Robert

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Persse, his executors, administrators, and assigns, interest upon the said sum of 16,000*l.* at the rate of 5*l.* per cent. per annum from the day of the death of Robert Persse.

By a marriage settlement dated the 15th of July 1833, and made in contemplation of a marriage which was afterwards had between the appellant Dudley Persse and Frances Barry, Dudley Persse, in consideration of the marriage portion of the said Frances Barry, amounting to upwards of 20,000*l.*, conveyed the reversion in fee expectant upon the determination of the estate in tail male, limited to the first and other sons of Dudley Persse by his first wife, Katherine O'Grady, by the settlement of the 11th of November 1826, in the Roxburgh estate, to trustees for 1,000 years, for raising portions for the younger children of the marriage, and subject thereto to the appellant Dudley Persse for life, with remainder to the first and other sons of the marriage in strict settlement; and he covenanted, when he should become possessed of the Castleboy estate, to settle it to the same uses as he had settled the Roxburgh estate.

On 19th June 1835 the appellants, with the exception of the appellant Elizabeth Persse, who was afterwards made a plaintiff by amendment, filed their original bill in this cause, stating to the effect before mentioned, and stating that the said Robert Persse and Robert Henry Persse had cut a great deal of timber, both ornamental and otherwise, upon the Castleboy estate, and had ploughed up and burnt part of the estate; and praying that the indenture of the 9th day of June 1830 might be declared fraudulent and void, and might be brought into court and cancelled; and that

the respondents Robert Persse, and Robert Henry Persse, and the said Earl of Rosse might, in pursuance of the covenant of the respondent Robert Persse in the indenture of the 8th day of December 1827, be compelled by the decree of the Court to convey the Castleboy estate to and for the several uses and trusts specified and mentioned in the settlements of the 11th day of November 1826 and 15th day of July 1833, so far as the same were then capable of being effectuated ; and that Robert Persse and Robert Henry Persse might be restrained by the order and injunction of the Court from cutting down any timber or other trees upon the said premises of Castleboy, or from burning any of the land, or from committing any other waste on the said Castleboy estate ; and that an account might be taken of the waste committed by the said respondents Robert Persse and Robert Henry Persse, or either of them, on the Castleboy estate, and the value thereof ascertained, and that the sum due on the said account might be paid into court, and invested or otherwise disposed of, according to the rights of the parties thereto.

The respondent Robert Persse by his answers stated, that Dudley Persse had withheld the payment of the annuity provided by the deed of the 11th November 1826, and suffered a large arrear to become due, whereby he became embarrassed, and that Dudley Persse had withheld the payment of the annuity in order that, by taking advantage of Robert Persse's distress, he might carry into effect certain plans which he had formed as to extorting from Robert Persse his expectancy in the Castleboy estate ; that he had executed the deed of the 8th December 1827 without being aware of its nature and effect ; that he never intended to convey his expect-

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tancy in the Castleboy estate, but he only intended by the execution of the deed to charge the estates with the expense of prosecuting the commission of lunacy ; that he was induced to execute the same by fraud and misrepresentation of the object of the deed, and without having received any valuable consideration, and that the same, being a voluntary agreement, ought not to be binding upon him ; and he stated, that Charles O'Connor, who prepared the deed, was not then or upon any previous occasion his solicitor, and that he executed the same without any professional advice.

On the part of the plaintiff it was proved that Charles O'Connor was the solicitor of Dudley Persse, and that he had suggested to Dudley Persse the necessity of suing out a commission of lunacy against Robert Parsons Persse, in order to save the estate to the family ; and that, in consequence of communications conveyed by Charles O'Connor from Dudley Persse to his father on the 3d of December 1827, Robert Persse and Dudley Persse went to the house of Charles O'Connor in Dublin, when Charles O'Connor took down in writing Robert Persse's instructions, whereby he agreed to convey to Dudley Persse his expectancy in the estate of Castleboy in consideration of love and affection, reserving a life interest in the estate, and that Dudley Persse should have full power to proceed in his name in suing out the commission of lunacy.

These instructions were submitted to counsel as instructions for the preparation of the deed ; the counsel wrote at the foot of the paper the words following :—

“ I have not made Mr. Robert Persse's estate for
“ life free from impeachment of waste, nor given
“ him a leasing power, not being so instructed.”

The draft of the deed of 8th December 1827 on behalf of Dudley Persse was laid by Charles O'Connor before Waller O'Grady, a barrister, and brother-in-law of the appellant Dudley Persse, for his perusal and amendment, the instructions for which purpose were written in the fold of the draft, and at the foot thereof were written, in the handwriting of Charles O'Connor, the words

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“ Quere { leasing powers?”
 { impeachment of waste?”

Mr. Waller O'Grady introduced into the draft a recital of an agreement between Robert Persse and Dudley Persse, that Dudley Persse should sue out a commission of lunacy against Robert Parsons Persse, and carry on such suits and legal proceedings as should be necessary for the protection of the person and property of Robert Parsons Persse, at the sole cost and expense of Dudley Persse; and altered the draft by making Dudley Persse tenant for life, instead of tenant in fee.

A draft of the deed was afterwards submitted to Mr. Serjeant Blackburne by Charles O'Connor on behalf of Robert Persse, and appeared to be a copy of the draft as altered by Mr. Waller O'Grady, with the same instructions in the fold, except that the queries as to giving the respondent Robert Persse a leasing power and rendering him dispunishable of waste were omitted. Mr. Blackburne altered the draft, by making it a deed of covenant instead of an actual conveyance.

In the draft as settled by Mr. Serjeant Blackburne there remained in the covenant against incumbrances an exception as to leases to be made by Robert Persse;

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Mr. Waller O'Grady, after the draft had been so settled by Mr. Serjeant Blackburne, struck out the exception as to leases to be made by Robert Persse, and made the following observation in the margin :—

“ As the object is very much to unite the two
“ demesnes of Roxburgh and Castleboy, it is
“ not intended that either party should have
“ leasing powers.

“ W. O'G.”

It was proved that the deed of the 8th December 1827 was, on the day of its date, executed by Robert Persse at Lord Guillamore's house in Dublin, and though Lord Guillamore was not actually present at the execution of the deed he was frequently in the room when the parties had met for that purpose; and Robert Persse, after the execution of the deed, delivered the deed which was in his possession to Lord Guillamore, saying, that the younger branches of his family, when they had found he had executed the deed, would annoy him on the subject, and that therefore he wished Lord Guillamore to take care of it, and not to deliver up the deed though he wrote for it, unless he came in person.

It was proved that, in the month of December 1827, Robert Persse had declared that the Roxburgh and Castleboy estates should never be separated, and that for that purpose he had executed a deed to his son Dudley. It was likewise proved, that Robert Persse, upon being asked whether he intended by the deed of 1827 to make any further provision for his younger children, stated, that he did not intend to make any such provision by that deed. It was proved also, that a great quantity of timber on the estate had been cut

down, and a great quantity of ancient meadow broken up and set in con-acre.

One of the defendants witnesses, James Blakeney, deposed, that his father was law agent to the respondent Robert Persse up to 1823 or 1824, and that his father was succeeded (as he believed) in the law agency to Robert Persse by Charles O'Connor; and Robert Persse wrote two letters to Charles O'Connor, dated the 3d of February and 10th of April 1828, in the first of which he states, "That his cook had been served with a paper on the 1st instant, and he supposed that a similar one was served on Dudley;" in the second he states, that "Burton Persse's man is on the lands this day, directing all the meadow lands to be cleared of the stock, and fenced up. Is it possible that he can hold over the lands, and his lease expired at the death of Robert Parsons Persse? What is the Chancellor doing? Surely it is time for him to declare who is to be the owner of the property? By Barton being allowed to hold over the lands and cut the meadows, it will take 500 guineas out of the pocket of the heir-at-law. Let me hear from you if you have any thing pleasant to communicate in my cause." And it was proved on the part of Robert Persse that he was during the years 1826, 1827, and 1828 in want of money and in embarrassed circumstances.

The cause came on to be heard before the Lord Chancellor of Ireland on the 7th day of February 1837, when his Lordship decreed, as to so much of the appellants amended bill as related to the subject of waste, that the same be dismissed, with costs; and that as to the remainder of the said original and amended bills, that the same be dismissed, without costs; and that as to the

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draft deeds, that the same be deposited with the registrar, with liberty for all parties to inspect the same. And it was ordered, that the defendants, the Earl of Rosse, Sir John Burke, John Martyn, James Lambert, Anthony Richard Blake, and John Prendergast Vereker, are entitled to have their costs against Dudley Persse.

From this decree the appellants appealed.

Appellants
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Mr. Pemberton and Sir William Follett for the Appellants.—The deed of 1823 was more advantageous to the father than the son. The father's age was sixty-two. The consideration for the father's giving up his life estate, which was fixed by the stamp office at 29,250*L.*, exceeds the value of the father's life interest.

In 1827 Robert Parsons Persse was supposed to be a lunatic; it was thought advantageous that a commission should be sued out; it was inconvenient to the father to incur the expense of suing out the commission, and the son was unwilling, unless he could derive some advantage from it. If Parsons Persse had made a valid will before his lunacy, all the proceedings would have been useless; and this was not a matter of speculation, as a will was actually set up; so, if the jury had not found that he was in an unsound state, the whole expense would have fallen upon the son. The arrangement of the deed of the 8th December 1827 was a natural family arrangement, that the son should be at the expense of the commission; and if Robert Parsons Persse died in the lifetime of the father, that the Castleboy estate was to be settled in the same way as the Roxburgh estate: the father had repeatedly expressed his wish that the

two estates should be re-united. The sum of 250*l.* beyond taxed costs was the expense of the commission. The decree cannot be sustained upon any thing in issue in the pleadings. The defence is, that the deed was executed for securing Dudley Persse's advances; if this was the object of the deed, why did he dispose of the estate by the deed of the 19th of June 1830 without mentioning that security? Then it is objected that the defendant did not consent to the omission of a leasing power, or that the estate should be impeachable for waste.

The attention of the defendant is called by the bill to his having an estate impeachable of waste, and yet he takes no notice of it in his answer; he does not state, as he ought to have done, that he never intended to convey free from impeachment of waste; nor are these objections put in issue by the answer. He admits that he told O'Connor to prepare the deed with expedition, and admits the execution, but says he was not aware of its effect. O'Connor was the solicitor both of the plaintiff and defendant. It is proved that the deed was read over to him, and there is no imputation that he is not a competent person. If there was fraud the Chief Baron must have been a party to it; but the Lord Chancellor of Ireland absolves the O'Gradys from all fraud. The deed substantially accords with the instructions, and it must have been agreed between the parties that the estate should be impeachable of waste and without any leasing power. The Lord Chancellor says, that there is no adequate consideration for the deed; but this is not a case where inadequacy of consideration will operate; it is a case of family arrange-

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ment. All the cases upon that subject are collected in *Neale v. Neale*¹, *Tweddell v. Tweddell*.²

Mr. Knight Bruce and Mr. Jacob for the Respondents.

—Is this such an agreement as a court of equity will carry into effect? 1st. The contract is illegal; it has the character of champerty and maintenance: giving an estate to one for life and another a reversion in fee is equally champerty as if there was a division of the estate. This is not the suit of the father maintained and assisted by the son, but joint suit of father and son for *campi partitio* under a joint agreement between them: *Byrne v. Frere*³, *Wood v. Downes*⁴, *Harrington v. Long*.⁵ 2d. Contrary to the policy of the law. The Chancellor was deceived in the proceedings in lunacy; and *Dudley Persse* is examined as a witness in the lunacy, divested of all interest, neither the real object nor the real petitioner appearing in the proceedings before the Court. 3d. Want of mutuality. What damages could the father have recovered against the son if the son had refused to bear the expense of the legal proceedings? *Lawrence v. Butler*⁶, *Hamilton v. Grant*⁷, *Bozon v. Farlow*.⁸ Hardship, distress, and ignorance are all grounds for refusing to execute this agreement: *Evans v. Chesshire*⁹, *Wiseman v. Beake*.¹⁰ It was not a family arrangement: *Pullen v. Ready*¹¹, *Stapilton v. Stapilton*¹², *Cann v. Cann*¹³, *Cory v. Cory*¹⁴, *Stockley v.*

¹ 1 Keen's Reports, 672.

² 2 Molloy, 157.

³ 2 Milne and Keen, 590.

⁴ 3 Dow, 33.

⁵ Belt's Supp. to Vesey, sen. 307.

⁶ 2 Atk. 587.

⁷ 1 Pere Williams, 723.

⁸ 1 Turner and Russell, 1.

⁹ 18 Ves. 120.

¹⁰ 1 Sch. and Lef. 20.

¹¹ 1 Merivale, 459.

¹² 2 Vernon, 121.

¹³ 1 Atk. 2.

¹⁴ 1 Ves. 20.

Stockley.¹ No provision by this deed for younger children: one son with an estate of 4,500*l.* a year, the others scarcely having any provision. Family arrangement must be for the benefit of all the family. There must be no concealment or suppression: *Gordon v. Gordon*.² The draft was sent to O'Grady, who sees the draft will not do, and invents a consideration. The deed voluntary but for O'Grady's alterations; and a court of equity does not execute a voluntary agreement: *Underwood v. Hithcox*.³ He, again, strikes out of the draft the word leases, for which he had no authority. A court of equity only carries into execution an agreement which is certain, fair, and just, especially where the contract relates to a future interest, *Buxton and Lister*.⁴ It lies upon him who seeks to enforce a contract in respect of a reversion to prove adequacy of price. It is impossible to put a definite construction upon what suits or proceedings Robert Persse had a right to call upon his son to institute. Who was to be the judge of the necessity or expediency of the suits? If the son was to be the judge it is illusory, and the father could not compel the son to institute any suits. Is the agreement fair? It was executed by surprise; there was no opportunity given to the father of consulting his friends, no solicitor employed on his behalf. Lord Plunkett says the attempt to prove O'Connor the solicitor of Dudley Persse is a miserable failure. This is a suit to enforce, not rescind, an agreement, *Stanley and Robinson*.⁵ The solicitor prepared two drafts; neither of the drafts are conformable to the instructions.

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¹ 1 Ves. and Bea. 23.

² 3 Swanston, 473.

³ 1 Ves. 279.

⁴ 3 Atkins, 382.

⁵ 1 Russell and Mylne, 527.

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(LORD CHANCELLOR.—This is entirely a new case, for which the plaintiff could not be prepared.)

The plaintiff must be prepared to prove that the instructions were conformable to the deed. He had no occasion to say he was taken by surprise, because he had the documents upon which the bill was drawn. The father was taken to Lord Guillamore's to have the deed executed; he was only there on this occasion, when the estate was to be made over to his son-in-law, and unusual courtesy was shown to him.

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Mr. Pemberton in reply.—The Court never refuses relief when the contract is not executory. Here all that could be done has been performed by the son; the plaintiff is only calling for the legal estate to perfect the settlement; no adequate relief at law on account of the various interests. There must be an action at law by each cestuique, and it is admitted that Robert would be unable to pay the damages. Champerty and maintenance do not apply to this case: this is no adverse suit, nor is there any property to be recovered. Then it is said there is no mutuality: want of mutuality only applies where the party coming for performance is not himself bound, as in the case of an infant; but if after the infant comes of age he files the bill, the objection fails: want of mutuality is not an objection where the agreement on one side has been actually performed. Inadequacy of consideration is not alleged; but in a family arrangement pecuniary consideration not of importance. Evidence must be looked to with reference to the issue joined: defence on the record differs from that made at the bar, and precludes the plaintiff from having any opportunity of explaining.

It appears by the original bill that Robert was tenant for life impeachable of waste, yet the answer does not say that he ought to be unimpeachable of waste, but denies the agreement to make any settlement at all; and the instructions and drafts were proved to show that a settlement was intended, and not security. The variance between the instructions and deed is prejudicial to Dudley; there never was any agreement that Robert should be dispunishable of waste, or have a leasing power. Whether he should or not was properly suggested by O'Connor and Miller, and O'Grady had means of communication with both parties; and it must be inferred that he had directions from Robert for making alterations in the draft. The only issue raised has been proved that a settlement, not a security, was intended. The object of the settlement was to re-unite the estates.

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LORD CHANCELLOR.—My Lords, I do not feel that I can at present call upon your Lordships to come to a final conclusion upon this cause; it is a matter of very great importance to the family, and involves questions of general importance as affecting the proceedings in courts of equity. But there is one circumstance as to which the other noble Lords who are present and myself, I believe, entirely concur, namely, that it is impossible for us to affirm the decree. I stated to your Lordships that it involves a question of extremely great importance in proceedings in courts of equity. We find that the issue which is raised upon the pleadings is proved on the part of the plaintiff, and disproved on the part of the defendant. The defendant has thought proper to tender a false defence; he has put his case upon that which is

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disproved by all the evidence in the cause. There can be no doubt that he must have been aware when he executed the deed in question, and at the time when he put in his answer,—I am sorry to say he could not have forgotten,—that that deed was not merely in respect of the prosecution of the commission of lunacy, but that it was a settlement of the estate, in some way at least, upon his eldest son. He has, however, thought proper to take issue with the plaintiff upon that fact, and the plaintiff, therefore, in preparing for the hearing of this cause, had only to prove his own case and to repel the case made by the defendant, which, I believe, we are all of opinion he has completely succeeded in doing.

It is very true that there are circumstances, which appear upon the evidence which the plaintiff has gone into for the purpose of proving the issue stated in the pleadings and no other, which may be said to call for explanation, but the plaintiff has had no opportunity of entering into that explanation. It was not necessary for him to go into it, because upon that subject there was no issue tendered by the defendant; it is no part of his case upon his answer to state, that, although it is true he intended to make a settlement of his estate upon his son, with certain powers reserved to himself, there was, either by fraud or by negligence, an omission of those provisions which would have been for his benefit. There is no allusion to such a state of facts in the answer put in, in the cause. It was not only, therefore, not necessary, but it would have been superfluous for the plaintiff to have gone into evidence to disprove that which was not affirmed. At the same time, my Lords, there are circumstances, no doubt, which may, if investigated, show that the defendant has a case by which he

might be enabled to resist a part of that at least which is asked for by the plaintiff. I confess I have very great difficulty in permitting the defendant, after all which has occurred,—after a statement of a false issue in a contest with his antagonist, to have an opportunity of going into the proof of another case. I think it is extremely dangerous in principle; that it would be very likely to lead to improper means of meeting a claim when made, and also would incur some danger of very great difficulty being felt in coming to a satisfactory conclusion upon any inquiry which might be directed for that purpose. The only doubt, however, which I have, and I believe I may say which my noble and learned friend now present entertains, upon this subject is, whether there ought to be some mode directed by which those circumstances which the plaintiff has had no opportunity upon the record, as the defendant tendered the issues to him, of explaining, should be the subject of further investigation. For that purpose it is necessary that we should take time to look into the proceedings, and in order to that I would propose to your Lordships that the further consideration of the case should be adjourned.

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LORD WYNFORD.—My Lords, I entirely concur with my noble and learned friend, that the issue which has been tendered by the respondent, and which is that which therefore ought to be met by the appellant, has been proved clearly on the part of the appellant, and disproved as far as regards the respondent. But still, my Lords, I cannot but think that there are many circumstances in this case which are not met, probably it may be from the fault of the respondent that they were not properly brought before the Court; but it

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appears to me that you cannot give a perfectly satisfactory judgment unless you can find out some mode by which these circumstances may be further investigated. I quite agree with my noble and learned friend, that it is an extremely dangerous thing, where a cause has been tried upon one point, to open it afterwards to the parties to inquire into other matters; but I think that the danger may be avoided in this case, if the objections which occur to me shall, on further consideration, appear to be made out by the evidence on the part of the plaintiff. I think it will be very dangerous now to let the defendant go into fresh evidence; but if it appears on the evidence on the part of the defendant that a judgment in favour of the plaintiff ought to have been given, or at least one less favourable to the defendant, it appears to me that there may in such case be a further investigation. What the mode of that investigation should be I do not know: it occurred to me at one time, and it struck my learned friend at one time, that it might be sent to an issue, but the matter is of such an extended nature that it is impossible the facts on which information is desirable can be satisfactorily ascertained by an issue. I am not familiar enough with the practice of the Court of Chancery to know what other mode there may be by which this matter may be investigated, but I agree with my noble and learned friend that it is highly proper, in a case of so much importance, and where I feel bound to say I cannot quite approve of the conduct of any of the parties to these transactions, that some delay should take place, for the purpose of considering whether any mode can be discovered by which the facts may be more clearly ascertained.

Further consideration adjourned.

7th May 1840.

LORD CHANCELLOR.—My Lords, the object of this bill was to carry into effect an arrangement between the plaintiff Dudley Persse and his father, the defendant Robert Persse, respecting a considerable landed estate which belonged to Parsons Persse, a supposed lunatic, to whom Robert Persse was heir-at-law.

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By a previous arrangement of 1823 Robert the father, who was tenant for life of the family estates called Roxburgh, with remainder to his son Dudley in tail, had conveyed his life estate to Dudley in consideration of an annuity of 800*l.* for his own life, and payment of debts which he owed, which are stated to have been equal to 17,000*l.*, and a charge upon the estate of 6,000*l.* for his younger children. The estate is represented to have produced about 4,500*l.* per annum, and the age of Robert the father in 1823 is stated to have been about sixty-one or sixty-two. Much has been said as to this transaction, but the propriety of it is not in question in this cause; its validity has never been impeached, and the provisions of it are very material for the purpose of showing the relative situation of the parties in the year 1827.

Before this time, that is in 1826 Dudley the son married Miss O'Grady, and by the settlement upon that marriage this Roxburgh estate was so settled that Dudley took only a life estate, with remainder to his elder son in tail, and provision was made for the wife and the younger children. Such was the state of the family property in 1827, at which time apprehensions were suggested that unfair means might be resorted to by others to deprive the family of the succession to the estates of Parsons Persse, the supposed

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lunatic, which were called the Castleboy estates. The lunatic was at that time about forty, Robert Persse the father was sixty-five or sixty-six, and Dudley a young man. It is, therefore, obvious that Dudley's expectancy of succeeding as heir was much more valuable than his father's, and if he had so succeeded he would have had the fee.

From expressions proved to have been used by the father it appears that the Roxburgh and the Castleboy estates had formerly been united in his family, and that he was anxious that they should be re-united; but to effect this purpose it might be expedient that Dudley should not have the power of disposing of the Castleboy estate any more than he had of the Roxburgh estate. The course recommended to secure the Castleboy estate was to sue out a commission of lunacy against Parsons Persse, the expense of which, though to be paid out of his estate if the lunacy were established, required an immediate advance of money, which would fall upon the party suing out the commission if the lunacy should not be established. Robert Persse the father had been a bankrupt, and had no command of money; under these circumstances the deed of covenant in question in this cause, dated the 8th of December 1827, was executed, the effect of which was, that Dudley the son was to undertake the prosecution of the commission in the name of his father, the heir-at-law of the supposed lunatic, and the Castleboy estate, if it should descend upon the father upon the death of the lunatic, was to be settled so as to give to the father an estate for life, subject thereto upon the same trusts and purposes as the Roxburgh estate stood settled.

The commission was sued out and proceeded with

success. The lunatic died in October 1829, and a will having been set up an ejectment was brought by the person claiming under it, but upon a trial the jury found a verdict against his claim. The title of the heir being thus established, in June 1835 the present bill was filed to carry into effect the provisions of the deed of the 8th of December 1827; and with reference to the grounds upon which the prayer of that bill was refused by the Court of Chancery in Ireland, and upon which the decree has been supported at the bar of this House, it is of the utmost importance to consider the defence set up by the answer. That defence consisted simply in stating that the deed had been obtained by misrepresentation and fraud; not of advantage taken of the distressed circumstances of the defendant, the father, or of his want of legal assistance in stipulating terms for his own advantage, but by a fraudulent misrepresentation of the purport and object of the deed; the defendant Robert deliberately swearing in both his answers that he never intended to give up his expectancy of succeeding as heir to the lunatic, or in any manner to agree to settle his estate, but that the extent of his intention was to charge the expenses of prosecuting the commission upon the estate; and that he was told and believed that such was the only object and purport of it. That this defence is false in every part is proved beyond the possibility of doubt; the judgment assumes that it is so; the instructions for the deed of December 1827, if known to Robert the father, disprove it; and four witnesses, O'Connor, Nolan, Waller O'Grady, and Richard O'Grady, prove that the deed was read over to and a copy read by Robert the father before he executed it; and Richard Adams proves subsequent

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recognitions of it by him. Lord Guillamore, the late Chief Baron of Ireland, though not actually present at the execution of the deed, was frequently in the room when the parties were met for the purpose, and was made the depository of the deed by Robert the father. If any such fraud as that sworn to in the answers was contemplated, Lord Guillamore and his two sons must have been parties to it, or, what is scarcely more credible, the real author of it must have chosen to practise it in their presence.

It is unnecessary, however, to observe further upon this defence, as it forms no part of the judgment appealed from, and was not relied upon at the bar by the counsel for the appellant. But in considering the ground upon which the judgment was founded, and those upon which the right of the son to the relief he prays was denied at the bar, it must not be forgotten that the defendant pleaded this defence, and no other, and is therefore not at liberty to set up any other which depends upon matters of fact not put in issue, and which the plaintiff, therefore, has had no opportunity of disproving or of explaining. Objections to the relief prayed, which rest upon the nature or provisions of the deed itself, or upon facts common to both parties, are not open to this observation; but, assuming that the father was perfectly acquainted with the contents of the deed before he executed it, to permit him to impeach it upon matters of fact not put in issue by him would be contrary to the established rules of courts of equity, and inconsistent with the most obvious principles of justice.

Some of the grounds relied upon on behalf of the defendant are of a middle character, arising out of facts

put in issue, it is true, but for a totally different purpose, such as the instructions and drafts of the deed proved by Mr. O'Connor. This the plaintiff put in issue to disprove the defendant's statement, that he conceived the deed to be only a security for the expenses of the commission; but the circumstances under which those instructions were given and those drafts prepared were not put in issue, the transaction not being impeached upon any statement connected with that transaction. No opportunity, therefore, was afforded to the plaintiff to explain what may now seem to require explanation, or to prove additional facts where the information may appear defective. I should, therefore, have thought that any suspicions, arising from so much of the transaction as was so proved in the cause, ought not to have led to any conclusion influencing the decision of the case; but seeing that many such circumstances have been much relied upon, it may be expedient to examine how far such suspicions appear to be well founded.

It was contended that the son had taken an improper advantage of the distressed situation of the father, occasioned by the withholding his annuity. I do not find any proof of this, but, on the contrary, it appears that there was no complaint made and no ground of complaint upon that subject. The father was, indeed, in circumstances which precluded him from incurring expenses or pecuniary liabilities; but that can only be referred to his own misfortunes or extravagance: and it is to be observed that this part of the defendant's case is inconsistent with another much relied upon, namely, that the undertaking by the son to prosecute the commission was no burden upon him, and, therefore, no consideration for the deed, because the property of the

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lunatic was ample to provide for the costs. But if that were so, how could the distressed situation of the father prevent him from himself prosecuting those proceedings, and where was the inability to do so, which is alleged to have been used by the son as a means of depriving the father of that to which he was entitled?

Another objection taken to the transaction was, that the father had no professional advice, Mr. O'Connor being exclusively the solicitor of the son. I think it is proved that Mr. O'Connor acted as solicitor for the father as well as for the son, and that he was the person whom the father was so far in the habit of consulting as to make him the most natural person for him to employ upon the matter of the lunacy. The evidence of James Blakeney, examined by the defendant, and the letters of the 3d of February 1828 and the 10th of April sufficiently prove this. It is true that he also acted as solicitor for the son, and was thereby placed in the difficult and responsible situation of acting for two clients in a matter to be settled between them; but the objection, if any, must be, that Mr. O'Connor betrayed the interest of his client the father in favour of his client the son, and not that the father had not professional assistance.

The ground upon which it was contended that the solicitor betrayed the interests of his client the father rests upon the written instructions and the drafts of the deed of 1827, which he produced for the purpose of proving the falsehood of the defence set up in the answer. The instructions were taken down at the meeting between the father and the son; they certainly are very short, but they embrace the whole of the arrangement as afterwards carried out; they provide

that the father should give up his expectancy in the Castleboy estate, except a life interest for himself, and that the son should prosecute the commission. This appears to have been the whole at that time settled. When the solicitor afterwards prepared the instructions for counsel, and when the counsel employed for each of the parties proceeded to prepare the draft of the deed, it naturally occurred to inquire whether the life estate of the father was to be dispunishable of waste, and whether he was to have a leasing power. The absence of provisions for these purposes in the deed is not insisted upon or alluded to as an objection in either of the answers; no explanation, therefore, could be expected on behalf of the plaintiff. That many opportunities occurred of discussing this and all other matters connected with the proposed arrangement, is proved by Mr. O'Connor, and by Mr. Waller O'Grady, in whose father's (Lord Guillamore's) house the father was residing; and that additional details were arranged after the written instructions taken by Mr. O'Connor, is proved by the fact, that by deed the Castleboy estates were to be settled to the same uses as the Roxburgh estate, in which the son had only a life estate, whereas the instructions would have given to him the fee; an alteration which the son would not have consented to if it had not been stipulated for by or on behalf of the father. What passed upon this subject, or relative to the leasing power of the life estate not being dispunishable for waste, is not stated, no explanation being called for by the defence set up; but as the defendant does not complain of the deed because it does not contain such provisions, why is fraud and imposition to be assumed on behalf of a party who with a deed before

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him, as stated in the bill, does not suggest any such fraud or imposition, and against a party who has thus been deprived of an opportunity of explaining the circumstances which led to the omission of them? Incidentally, however, and by accident, it is proved that the father expressed a desire that the Roxburgh and Castleboy estates should be re-united in his family, which tends to explain the absence of a leasing power for any terms which could be turned to profit by the tenant for life; and that, upon being consulted whether he wished to have a power of making any provision out of the estate for any of his younger children, he answered, that he did not, which explains the absence of a power to cut timber, as it may be assumed that he would have exercised such a power for that purpose. It appears to me, therefore, that there were not sufficient grounds for the suspicion of unfair dealing which have been relied upon, and that regard being had to the matters put in issue by the pleadings such suspicion ought not to have influenced the decision of the cause.

It was, however, open to the parties to rely upon objections appearing upon the face of the instrument, upon which relief was prayed. These objections, though divided into many heads in the argument, may be reduced to four: first, that the contract was illegal, as partaking of champerty and maintenance; secondly, that it was illegal against public policy, and a fraud upon the great seal in the matter of the lunacy; thirdly, that there was no mutuality in its provisions; fourthly, that the covenant was voluntary, being without any, or at least without any adequate, consideration.

As to the first the answer is obvious; there was no suit to be maintained, and no property in litigation to

be divided. Upon the second objection no case was cited, and I have not been able to understand how an arrangement between parties expecting property upon the decease of a lunatic can be a fraud upon the great seal in the matter of the lunacy, or upon the ground void as against public policy. The thing to be looked to in matters of lunacy is the protection of the person and property of the lunatic, and for that purpose the encouragement to parties to interfere, and to bring the facts before the Court. It is obvious that this object would in many cases be impeded, rather than promoted, by holding that all agreements relative to the costs of the proceedings or the ultimate division of the property were void. I have not heard any principle or authority in support of this objection. Agreements as to expectancies have been enforced in equity, which appeared to be open to serious objections, which do not apply to the present case.

In support of the third objection, that there was no mutuality in the contract, some well known cases were cited; but the question here is, whether, after the risk incurred, and the benefit secured, and the consideration thereby paid, the father can on his part resist the performance of the contract which led to those results? If this objection could prevail in this case, how could decrees for specific performance where the defendant only signed the agreement, or upon part performance, be maintained? In those cases there is no mutuality in the sense in which the word is used in the present argument, because the contract, being within the statute of frauds, could not have been originally enforced against the plaintiff; but he having performed his part is entitled to compel the defendant to perform his.

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Fourthly, the supposition that the covenant was merely voluntary is negatived by the plaintiff's own statement of the case, for beyond all question some consideration proceeded from the son. The object of having a commission of lunacy prosecuted, the father's inability to undertake it, from whatever cause proceeding, and the fact of the son's having taken upon himself the prosecution of it, are facts common to both parties, and show that the covenant was not merely voluntary; leaving the question to be considered how far it can be objected to upon the ground of the consideration being inadequate. The situation of the parties and the properties in question appear to me to afford a complete answer to this objection. The son was in possession of the family estate but as tenant for life only; from the relative ages of the father and of the son, and of the supposed lunatic, the probability was much in favour of the son, by the death of his father before the lunatic, succeeding as heir to whatever estate might descend from him; but there was a strong expectation, and, as the event proved, a great probability, that without active measures to counteract the fraudulent projects of others no part of the lunatic's estate would descend to either of them. It may well be supposed to have been an object of the father, who is proved to have been anxious for the re-union of the two estates, that the lunatic's estate should be settled in the same manner as the family estates. The agreement with the son effected all that could be done to secure the lunatic's estate to the family, and, if it should descend to the father, secured its re-union with the family property. By what scale of money consideration are these objects to be estimated? The impossibility of doing so has led to the exemption

of family arrangements from rules which affect others. The consideration in this and in other such cases is compounded partly of value and partly of love and affection. The ages of the parties made the father's expectancy of but little value, but if he had been certain of himself succeeding as heir to the lunatic, his own personal use of the estate would probably have been confined to a life interest. This, in ordinary cases, would have been the natural course, and not likely to be departed from, where the father had expressed his anxious wish that the two estates should be held together.

But there were several younger children unprovided for, and it is assumed that the father must have desired the dominion over the estate for the purpose of making some further provision for them. Experience does not prove that the want of the younger children generally induces fathers to deprive the eldest son of much of the inheritance, but in this case it is proved, that upon being distinctly asked the question he answered that he did not wish to have any power over the estate for that purpose. If this be true (and it is sworn to by two witnesses) the absence from the covenant of any power to make leases and to cut timber is very much explained. There is no allegation or proof that it was part of the agreement that the father should have such powers. The omission of those forms no part of the father's case; but, if the contract be otherwise binding, is the absence of such powers in an arrangement between a father and son such cogent proof of imposition as to invalidate it? The arrangement of 1830 is open to the same objection; and I cannot but consider the parties interested under the settlement as the real de-

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fendants in this case. The father appears to have but little, if any, interest in the contest. That arrangement of 1830 took place with sufficient notice of the previous arrangement with the eldest son, and, therefore, cannot prevail against it, if such prior arrangement was in itself binding.

Being of opinion that the objections stated to this arrangement are not available for the purpose of depriving the plaintiff of the benefit of it, I am of opinion that he is entitled to have it completed by a decree, and as the timber has been cut with full knowledge of the plaintiff's title and in defiance of the father's covenant, I think it impossible to deny to the plaintiff the account he prays upon the subject. I think also that the decree below ought to have been made with costs. There can be no costs of the appeal.

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LORD WYNFORD.—My Lords, in wading through these very long pleadings, I certainly should have thought there are many important questions which were submitted to your Lordships consideration, but it can make no difference in the conclusion to which I shall come, because I am decidedly of opinion, upon a view of the whole case, that the judgment which my noble and learned friend has advised your Lordships to give upon this occasion is the correct judgment.

My Lords, there certainly are many points in this case, which were touched upon by the counsel at the bar, which are not raised by the pleadings. I think your Lordships cannot with propriety take any notice of those, as nothing can be more dangerous in the administration of justice than to allow your decisions to be affected by matters which are not pleaded. If the at-

tention of the opposite party had been called to such points he might have given a denial, or a satisfactory explanation of such matters, which, by the course of pleading, he has been prevented from doing. The Court would, therefore, if it decided on those matters, be deciding on matters which it has been prevented from fully and satisfactorily hearing.

The points which are not adverted to in the pleadings are, first, that the respondent was not told that it was not necessary that he should take out a commission of lunacy, as it was competent to any other person to take it out; secondly, that he was not told that if he succeeded he would be paid out of the estate costs taxed as between attorney and client, that is, the whole of his expenses; thirdly, that the consideration was not sufficient to support the conveyance.

It might be observed, that the only consideration that was at first introduced was that of natural love and affection, and it was not until after it was discovered that the consideration did not prevent a subsequent conveyance from getting rid of it that any other consideration was introduced. But this is an objection that should not be made unless it be specifically pointed out by the pleadings. Now, the sufficiency of consideration depends on many circumstances, which may be proved by evidence, if the attention of the opposite party had been called to them. The deed of 1830, by which this conveyance is attempted to be set aside, is liable to great suspicion; it seems to be only colourable; the price is only eight years purchase, and that is not to be paid till after the purchaser has got possession.

The fourth objection is, that the conveyance was obtained by maintenance and champerty; the fifth,

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that the life estate was made unimpeachable of waste, and that no power of leasing was given to the tenant for life.

The two questions, as it has occurred to me, on the determination of which your Lordships judgment should depend, are: first, was the respondent deceived by being prevailed upon to execute a deed which conveyed Parsons Persse's estate absolutely to the appellant, which deed he was made to believe was only a security upon the estate for the expenses that the appellant was likely to incur by taking out and prosecuting the commission of lunacy against Parsons Persse? In support of this objection the respondent urges that the deed was prepared by the appellant's attorney, a person whom he had never employed; and that it was executed in Lord Guillamore's house, who was the appellant's father-in-law, in which the respondent, who had never visited Lord Guillamore before, had resided for a fortnight surrounded by his family. It is not true that the respondent had never employed the attorney before; he had employed him many years ago when respondent was a bankrupt, and he had since been employed by the respondent's man of business; and the respondent must have known that, for he must have paid the attorney's bills for the business that was then done. On this occasion the attorney was employed by the appellant, who sent the attorney to the respondent to prevail on him to sue out a commission against Parsons Persse. He persuaded the respondent to visit the appellant, and the appellant succeeded in getting him to go to Dublin, to give instructions for the commission of lunacy and for this deed. As the respondent had never before partaken of the hospitalities of Lord Guillamore, it would have

been more delicate in the appellant not to have taken the respondent to his Lordship's house on this occasion. But are these circumstances to disturb a solemn deed? Yet these are all which the respondent can bring forward. On the other hand, there are many witnesses of great respectability who prove that the respondent himself gave instructions for the deed; that it was read over to him at the time of its execution; that he expressed his intention to execute such a deed before it was executed, and declared that he should do this to unite the two estates in the same person; and that after the deed was executed he told another gentleman that he had executed such a deed, and declared that he had done it with the same object as that which he had mentioned to the gentleman to whom he had said that he would make such a disposition. Whatever circumstances of suspicion may hang about it, one can scarcely conceive a stronger case. O'Connor has sworn that he took the instructions for the deed from the respondent's own mouth; those instructions, although departed from in some respects, were to prepare a conveyance of the estate to the appellant for his own use, and were not authorizing him to prepare a security for the expenses to be incurred. O'Connor, the two O'Gradys, and Nolan, that is four witnesses, swear that the deed was distinctly read over to the respondent before it was executed by him. This is confirmed by Adams and Lambert, one of whom swears that the respondent spoke to him, before the deed was executed, of his intention to unite the two estates, and the other swears that some time after the deed was executed the respondent told him that he had executed a deed by which he had provided for the union of these estates.

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The second question that, it appears to me, is raised by the pleadings, as I have already stated, is perfectly immaterial with respect to the judgment on the case. Did he execute the deed under the pressure of distress which the appellant had occasioned by the nonpayment of the annuity payable to him by the appellant out of the Roxburgh estate? Considering the amount of that annuity compared with the rental of the estate out of which it was to be paid, and that the respondent had only this annuity to subsist upon, I cannot find any sufficient excuse upon the evidence for the irregularity with which it was paid. But this defence is inconsistent with the case before made by the respondent; he was not likely to be induced by distress to execute a deed which was to provide for the security of money to be expended for a purpose beneficial, although not in an equal degree, to both parties. A man under the pressure of distress may execute deeds to obtain the means of supplying his present wants, but not to provide for any remote advantage. The hope of advantage here was very remote; indeed, as Parsons Persse had by will given his estate from this branch of the family, and as it was so difficult to get him found a lunatic that one jury summoned to try that question had been discharged without finding a verdict, I do not think that there was any great probability that it ever would have been realized. I cannot think that your Lordships can say that this deed was executed under the influence of distress. Whether the execution of that deed were a wise act on the part of the respondent or not, I think it was executed by him with a full knowledge of what he was doing, and for the attainment of the object that he stated to Lambert and Adams he had in his contem-

plation when he executed it; and I cannot conceive that the straitness of his circumstances could have contributed to influence him to make that conveyance. I am, therefore, of opinion that the appeal should be allowed, the decree of the Court below set aside, and the directions proposed by my noble friend to your Lordships to be given should be given.

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It is ordered, that the said decree of the 7th of February 1837 be reversed; and it is declared, that the plaintiffs are entitled to the benefit of the indenture of the 8th of December 1827, mentioned in the said original bill, and of the covenants and agreements therein contained; and that the indenture of the 9th of June 1830, also mentioned in the said original bill, is to be considered as fraudulent and void so far as it affects or interferes therewith.

[19th June 1838, 1st June 1840.]

(From the Court of Exchequer.)

FRANCIS CLEE, JOHN ROBERTS, HENRY POWLES, JOHN
GEORGE, FRANCIS DAVIS, ANN PRICE, WILLIAM
BLACKLOCK, BENJAMIN PURSLOW, RICHARD WEIR,
and JOHN NEWMAN, Appellants.

GEORGE HALL, Clerk, Respondent.

SEPTIMUS HOLMES GODSON, JOSEPH COOKE, THOMAS
BARNES, and others, Appellants.

GEORGE HALL, Clerk, Respondent.

VINCENT WOOD WHEELER and others, Appellants.

GEORGE HALL, Clerk, Respondent.

“Privy tithes” synonymous with “small tithes,” though the Ecclesiastical Survey makes a distinction between “privy tithes” and “lesser tithes,” that distinction being explained by a subsequent terrier, distinguishing between tithes in general and privy tithes payable to the vicar; and there being evidence that in the district wherein the vicarage is situate privy tithes mean small tithes.

The endowment of a vicarage being established by ancient documents, and money payments having been made for privy tithes to the vicar since 1763 by some of the occupiers of the parish, and small tithes not having been claimed by or paid to the rector;—Held, as against a defence of the occupiers claiming in themselves or their

landlords title to the small tithes, that the vicar was entitled to small tithes of all lands in the parish, in respect of which no discharge had been proved; though some portion of the small tithes had been conveyed away by the owners of the rectory, that conveyance being capable of explanation by being referred to the glebe lands belonging to the rectory; and though some payments had been made for houses only, and in some instances payments had been omitted altogether.

ON the 31st July 1833 the respondent, as vicar of Tenbury, filed his bill in the Exchequer against the first-named appellants and John Bradley (since deceased), who were occupiers of lands within the town of Berrington and parish of Tenbury, claiming to be entitled to all tithes except tithes of corn and grain within the township of Berrington and parish of Tenbury.

The parish of Tenbury consisted of the hamlet or township of Tenbury, Tenbury Foreign, Berrington, and Sutton otherwise Sutton Sturmev.

The appellants by their answers denied the vicar's title to the tithes claimed by him, and stated that the rectory of Tenbury was formerly part of the possessions of the abbot and convent of Lyra in Normandy: that upon the suppression of the alien priories in the reign of king Henry the fifth it was granted by the Crown to and became part of the possessions of the priory and convent of Shene in the county of Surrey, and that upon the dissolution of monasteries it became vested in the Crown: that in the thirty-fifth year of the reign of king Henry the eighth the rectory of Tenbury, with the tithes and appurtenances thereto belonging, were, with divers other lands and hereditaments, granted by the Crown to Richard Andrews and Nicholas Temple, and the heirs and assigns of the said Richard Andrews for ever, at the yearly rent of 16s.: that soon after the

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appropriation of the rectory to the abbot and convent of Lyra a vicar of Tenbury was appointed, and a vicarage created and endowed with the great and small tithes of the hamlet or township of Sutton otherwise Sutton Sturmeay, or some part thereof, except a certain part of the said last-mentioned township called Sutton Park, but that the said vicarage was not endowed with any of the tithes, either great or small, within the hamlets and townships of Tenbury Town, Tenbury Foreign, and Berrington, but that they remained appropriated to the abbot and convent of Lyra as the rector of the said rectory of Tenbury; and that upon the suppression of the alien priories the said rectory, and the tithes and appurtenances thereto belonging, including all and singular the tithes, great and small, of the said three several townships or hamlets of Tenbury Town, Tenbury Foreign, and Berrington, were granted to and became vested in the said abbot and convent of Shene, and continued to be and were parcel of the possessions of the said last-mentioned monastery until and at the time of the dissolution thereof; and that upon the dissolution of the said monastery of Shene the possessions thereof, including the said rectory of Tenbury and all and singular the tithes of the said townships or hamlets of Tenbury Town, Tenbury Foreign, and Berrington, were granted by the Crown to the said Richard Andrews and Nicholas Temple, and the heirs of Richard Andrews: that Richard Andrews sold the rectory of Tenbury, and the tithes thereof, including all the tithes of Tenbury Town, Tenbury Foreign, and Berrington, unto certain persons, who were the owners of the lands comprised in the last-mentioned townships: that after such sale the owners of the lands in the several townships and their descendants, and purchasers from them,

and their tenants, held and occupied their farms and lands freed from the payment of all or any tithes whatsoever.

All the appellants, except Clee, George, and Blacklock, admitted that small annual payments under the name of privy tithes had been made by the occupiers of their farms to the vicar of Tenbury, and those payments had been made by the occupiers of houses as well as lands; but that such payments were in the nature of personal tithes, oblations, or obventions, and not as moduses or compositions for tithes.

On behalf of the respondent the following documentary evidence was produced:—

An extract from pope Nicholas's Taxation, whereby it appeared that the tenth of the church was taxed at two marks, and the tenth of the vicarage at one mark:

The following extract from the Ecclesiastical Survey:—

" Magister R. Shute vicarius perpetuus	£	s.	d.
" ejusdem ecclesiæ habet in decimis			
" prædialibus, viz., garbarum et feni et			
" unius molendini vicariæ suæ prædictæ			
" com̃ annis pertinentibus	-	-	10 8 8
" In libro suo computat pascha privatarum			
" decimarum com̃ annis	-	-	1 0 0
" In quatuor diebus, oblaç et aliis obla-			
" tionibus com̃ annis	-	-	1 10 0
" In decimis ovium venalium com̃ annis			1 3 4
" In mortuariis com̃ annis	-	-	0 3 4
" In minoribus decimis, viz., porcorum,			
" anserum, canapum, lini, ceræ, mellis,			
" et aliorum consimilium com̃ annis	-		1 16 0
" Item in emolumentis et proficuis ca-			
" pellæ de Rochford com̃ annis	-		5 6 8

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“ Et sic in toto 21*l.* 8*s.* Inde allocatur pro sinagio et
“ procuratione arch̄no ibidem annuatim resolut 8*s.* 2*d.*,
“ et sic remañ de clār 20*l.* 19*s.* 10*d.*; decima inde 2*l.* 2*s.*”

An extract from the Parliamentary Survey, in which
the value of the tithes of the vicarage of Tenbury was
stated to be worth 27*l.* per annum :

Two terriers from the bishop's court, of the diocese
of Hereford; one, after describing the vicarage house
and premises, states “ that the vicar hath no common
“ or pasture for sheep, but hath some tithe hay in the
“ common fields, but not of all the parish, and the
“ tithe of corn of the parish of Sutton.” The other is
in the following words:—

“ Teamburie, } A true terrier of the vicarage of
“ July 25, 1687. } Teamburie taken by us, whose

“ names are underwritten :

“ Imprim., one vicarage howse; 2ndly, one barne;
“ 3rdly, one hemplock; 4thly, 2 gardens; 5thly, one
“ portion of tyth from Sutton; 6thly, prive tythes from
“ the rest of the parish.

“ signed EDM. CLERK, vicar.

“ + JOHN UNKLES } church-
“ HUMPHREY LANE } wardens.
“ THOMAS WALDON.
“ FRAN. LANE.”

The grant of the Crown of the rectory of Tenbury
to Andrews and Temple, which only contained the
general words of “ all tithes” to the rectory belonging.

And receipts for payment of small sums, as for privy
tithes, from 1763 down to the present time.

The parol evidence produced on the part of the
respondent proved, that annual payments under the
name of privy tithes had been made to the vicar by
several occupiers of lands in the three townships of

Tenbury, Tenbury Foreign, and Berrington; that easter dues were different payments from privy tithes, and were paid at different times of the year; that small tithes in several parishes in the neighbourhood of Tenbury were known under the name of privy tithes; that the small tithes of the three townships had never been paid to the owner of the great tithes of the parish of Tenbury.

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On behalf of the appellants the documentary evidence produced was:—

An extract from the Nonæ Roll, stating “that the church of Temedbury is taxed at 20*l.*, whereof the ninth of sheaves, fleeces, and lambs is worth ten marks; that the land of which the church is endowed is worth by the year 40*s.*; the hay of the same is worth 6 marks; the tithe of mills is worth 38*s.*; oblations, obventions, and small tithes with mortuaries, are worth 6 marks; and it hath peculiar jurisdiction, with power of correction, which is worth by the year 7 marks:”

An extract from Inquisitions of Benefices of Alien Priors, from the Tower, wherein it is stated that the proctor of the abbot and convent of Lyra hath the church of Temdebury, which is worth by the year 20 marks:

An extract from the charter (in the Tower), of the third and fourth Henry the fifth, of the foundation and endowment of the monks of Sheen, whereby the possessions belonging to the alien abbey of Lyra in Normandy, together with all lands, tithes, &c. are granted to the prior and monks of Sheen:

The Ecclesiastical Survey:

The grant to Andrews and Temple:

An inquisition post mortem (12th September 1601) of Joyce Lucy (from the Rolls), which found that Sir Thomas Lucy, son of Sir Thomas Lucy and Joyce his

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wife, daughter and heir of Thomas Acton, was seised in fee as heir to his mother of the rectory of Tenbury :

An inquisition post mortem (15th July 1606) of Sir Thomas Lucy, the son, which found that he was seised at his death of the rectory of Tenbury, and that he left Sir Thomas Lucy, his son and heir :

A licence of the 2d April, nineteenth James the first, for Sir Thomas Lucy and Alice his wife to alien to Richard Milward, Rowland Corbett, and Richard Hayle, and their heirs, three messuages, two cottages, five gardens, five orchards, seventy acres of land, ten acres of meadow, and forty acres of pasture, and all and all manner of tithes in the tenements aforesaid, with the appurtenances in Tenbury :

A fine of easter term, nineteenth James the first, from Sir Thomas Lucy and Alice his wife, of the same premises and to the same persons as are mentioned in the licence :

A conveyance of the 18th of April, nineteenth James the first, whereby Sir Thomas Lucy conveyed to Milward, Corbett, and Hayle, and their heirs, a certain mansion called the parsonage in Tenbury, together with all the glebe lands, and one other messuage, and sixteen acres of arable land, and three other cottages, and two gardens in Tenbury, and all manner of tithes, corn, grain, sheep, wool, lamb, flax, hemp, and all other tithes whatsoever, and about fifty-six acres of other lands in Tenbury (without tithes being mentioned) :

A feoffment of 19th May, nineteenth James the first, from Milward, Corbett, and Hayle to Lane of twelve acres of land in Tenbury parish, and also all manner of tithes of corn, grain, and sheep, wool, lambs, flax, hemp, and all other tithes, great and small :

A feoffment of the same date and by the same persons, to John and William Warde, of four acres in

Tenbury, with all manner of tithes upon the premises renewing, without specifying particular tithes :

Various other deeds were produced, whereby the lands and tithes mentioned in the two deeds of feoffment were proved to be vested in the master and fellows of Pembroke College, Oxford :

An extract from the Parliamentary Survey (in Lambeth Palace), 1649, which states that in Tenbury there is a vicarage, and to the same belonging a house and garden worth 3*l*. per annum, and other tithes to the value of 27*l*. per annum :

A fine, of the twenty-eighth of Charles the second, by Richard Lucy and Elizabeth his wife, and William Molyneux and Bridget his wife, to Richard Leigh and Robert Bradshaigh, and the heirs of Richard, of certain lands in Tenbury and other places, and also of the tithes of the parishes of Tenbury and Berrington :

A fine, of the second of Anne, by Viscount Molyneux and Bridget his wife, to Sir William Gerrard, of the rectory of Tenbury with the tithes of sheaves, grain, and hay :

A recovery, of the ninth of Anne, wherein Robert Webber is demandant, and Sir William Molyneux, and Viscount Molyneux and Bridget his wife, and others are vouches of the advowson of Tenbury and the tithes of sheaves, grain, and hay.

The parol evidence on the part of the appellants was, that no tithes in kind or composition in lieu of tithes had ever been rendered to the vicar, but that small payments had been made by some but not all the occupiers of farms and lands in the townships of Tenbury Foreign, Tenbury Town, and Berrington, under the name of privy tithes, except two payments ; one, on the 29th September 1784, for 3*s*. per annum, viz., 1*s*. 6*d*.

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for Eaton's and 1*s.* 6*d.* for the tan-house, as a modus for small tithes to the vicar; another, on the 28th July 1796, of 1*s.*, being in full of a modus for privy tithe of Wight's meadow; that the payments had been made for houses as well as lands, and that the payments had been uniform with regard to Berrington farm. Francis Clee, however, had paid a yearly sum of one guinea in lieu of the crops of some ridges and parcels of land containing three quarters of an acre, part of his farm at Berrington, and this payment had varied in amount.

The first-mentioned cause came on to be heard before Mr. Baron Alderson on the 28th day of June 1836, when it was, amongst other things, ordered and decreed, that an account of the titheable matters and things (other than and except corn, grain, and hay) had and taken by the appellants respectively from and upon their said respective farms and lands since Michaelmas 1827, and of the tithes thereof, be taken with the usual directions; and that the costs of the suit, so far as related to the tithes of which an account was directed, should be paid by the defendants to the plaintiff.

From so much of the decree as is herein mentioned the first-mentioned appeal is brought.

Mr. Pemberton and Mr. Maule for the appellants.

Mr. Boteler and Mr. Simpkinson for the Respondent.

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LORD CHANCELLOR.—My Lords, in this case it appears to me particularly important to attend to the defences set up in the answers of the appellants. They all claim title in themselves, or in those under whom they hold their land, to the tithes demanded by the

vicar, and they all, except Clee, George, and Blacklock, admit payment of small annual sums to the vicar under the name of privy tithes. Against such defences it is certainly necessary for the vicar to show his title to the tithes claimed; but if he succeed in so doing it is not competent for the defendants, upon such defences as they have adopted, to set up moduses or compositions. The defendants have totally failed in showing any title to those tithes in themselves, or in those whose lands they hold. There seems to be some reason for supposing that some of the lands held by Roberts, Powles, George, Davis, and Price were formerly part of the rectory, but they have not proved that the small tithes in question were granted with the lands, or have since been conveyed with them. It is indeed stated in the appellants case, at page 4, that one of the houses in Tenbury Town, comprised in one of the deeds proved in the cause, was traced to the defendant Davis, but I do not find any evidence that any of the lands occupied by any of the defendants had been conveyed with the tithes in question. All the defendants, therefore, have failed in this their principal defence, namely, title in themselves to the tithes in dispute; but it is still open to them to insist that the vicar has failed in proving any title in himself. No endowment being produced, the vicar is at liberty to establish his title by other evidence. That there was a vicarage endowed before the year 1291 appears from Pope Nicholas's Taxation; the tenth of the church was taxed at two marks, and the tenth of the vicarage at one mark. The Ecclesiastical Survey is not very intelligible by itself, but it becomes more so when it is considered that the vicar appears to have all the tithes of a district called Sutton. When, therefore, the Eccle-

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siastical Survey speaks in one place of tithes of sheaves and hay, and in another of lesser tithes, to wit, pigs, geese, et cætera, it may be referring altogether to Sutton; otherwise it might be inferred that the privy tithes spoken of were something different from the lesser tithes. This establishes the fact that the vicar at that time was entitled to some endowment under the name of privy tithes.

The Parliamentary Survey and the first terrier afford no information, but the second terrier is very important. It states that the vicarage has one portion of tithes from Sutton, and privy tithes from the rest of the parish. The fact that the vicarage was endowed with some description of tithes from the parish generally is, I think, by these documents sufficiently established.

Of the payment of small sums as for privy tithes there is no dispute; the receipts go back as early as 1763, and in 1784 the payment is described as a modus for the small tithes. The same occurs in 1796, but in general the term "privy tithes" is used.

As these small tithes must originally have formed a part of the rectory, and as the question is, whether they were at an early period separated from the rectory as an endowment of the vicarage, it is material to ascertain whether they have been treated as still belonging to the rectory. The earlier documents, such as the grant to Andrews and Temple, in the thirty-fifth of Henry the eighth, prove nothing, as general terms only are used, such as "all tithes to the rectory belonging;" but in subsequent conveyances, such as the fines in the twenty-sixth of Charles the second and the second of Anne, and the recovery in the eleventh of Anne, there is a description of the advowson of the church

of Tenbury, and all and all manner of tithes of sheaves, grain, and hay; and there is no evidence that any small tithes from any of those lands were ever claimed by the persons entitled to the rectory.

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It is true that conveyances were produced from Millward, Corbett, and Hayle, who claimed under Andrews and Temple particular lands, with all tithes, as well great as small, arising and renewing within the premises, but from the preceding conveyance of the 13th of April in the nineteenth of James, there is good reason for believing that those lands were parcel of the glebe of the rectory, which may well be supposed to have been excepted from the endowment of the vicarage, and these form no part of the lands of the defendants.

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These ancient documents, taken by themselves, would constitute strong evidence of the vicarage being endowed with the small tithes generally, by proving that the vicar was entitled to some tithes called privy tithes, and that the small tithes had not, except in some few instances, (not in question in this cause), been conveyed with the rectorial tithes, and the parol testimony strongly confirms these deductions from the documentary evidence; as it proves the payment of those sums called privy tithes, and that they are different from easter offerings, and the small tithes have never been paid to the owners of the great tithes.

As to the meaning of the term "privy tithes" many authorities and instances were produced to show that the term was often used as synonymous with small tithes, proving, I think, satisfactorily that they cannot be understood to mean personal tithes, which is the meaning contended for by the appellant, and there is parol

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evidence that the term is understood in the district in which these lands are situated to mean small tithes. It is true, that as to some of the defendants there is no evidence of any payment of privy tithes having been made, but the question is, whether there be sufficient secondary evidence of the vicarage having been endowed with the small tithes, because if there be sufficient evidence of such endowment the vicar's right will be established as against all lands, (as to which no particular discharge is proved, although no small tithes have ever been paid for such lands.) The cases of *Kennicott v. Watson* in 2 *Eagle and Younge*, 690, and *Masters v. Fletcher*, in *Younge*, 25, established this proposition. Upon the whole, therefore, I think the decree of the Court of Exchequer right, and that it should be affirmed with costs.

Decree affirmed, with costs.

(SECOND APPEAL.)

On the 28th June 1836 Mr. Baron Alderson made the same decree for the payment of tithes against the appellants in this appeal as he had made against the appellants in the first appeal. From this decree this appeal was brought.

Mr. Kindersley and Mr. Godson for the Appellants.
 Mr. Boteler and Mr. Bethell for the Respondent.

4th August 1840.

LORD CHANCELLOR.—I think the right course will be, that as to some of the parties, namely, those who have not proved the possession of lands which formed part of

the premises comprised in the conveyances¹, on which so much stress has been laid, the decree must be affirmed with costs. With regard to two of the defendants, Cooke and Barnes, of course the bill must be dismissed; and I think that the bill must be dismissed with costs, because there never was a ground for attacking those parties, and they set up a case sufficiently in their answer² to entitle them to go into that defence. Then with regard to the costs of the appeal, I am of opinion that those parties who have succeeded in altering the decree, though it does not appear that they called the attention of the Court below to these distinctions, must be exempted from the order for the payment of the costs of the appeal.

With respect to those who hold glebe lands the decree must be altered, by exempting those lands which they prove to have been conveyed with great and small tithes; they must be exempted from the order which directs only the appellants who have no case to pay the costs of the appeal. Those who succeeded altogether in the withdrawing their lands from the operation of the decree, and the others who succeeded in withdrawing part of their lands from the operation of the decree, ought not, so far as those lands are concerned, to pay the costs of the appeal. The other appellants, who have established no distinction as to their lands, must pay the costs of the appeal; and those appellants who have shown

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¹ The particular lands comprised in these conveyances were proved in the cause to be vested in the master and fellows of Pembroke College, Oxford, and to be occupied by defendants Thomas Barnes and John Benbow as their tenants.

² The defendants Thomas Barnes and John Benbow by their answer insisted that the lands occupied by them were purchased by their ancestors, or by persons under whom they derived title, together with the tithes arising thereon.

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that none of their lands are liable to tithe must have the costs of the suit below.

It is ordered, that the decree of the 28th of June 1836 as to the said Joseph Cooke and Thomas Barnes be reversed, and that the bill as to them be dismissed, with costs: That the said decree as to John Russell, Charles Smith, and John Benbow be in part reversed as herein-after mentioned, and that the bill as to them be in part dismissed, with costs, as herein-after mentioned; that is to say, as to the said John Russell, so far as the said bill and decree relate to four acres, twenty-seven perches of land, mentioned in the answer of the appellants; and as to the said Charles Smith, so far as such bill and decree relate to a close containing one acre and three quarters, mentioned in the same answer; and as to the said John Benbow, so far as such bill and decree relate to a dwelling house and building and eleven acres of land in the same answer mentioned. And it is ordered, as to the three last-named appellants, in respect of other houses and lands in their respective occupation, that the decree be affirmed; and as to the rest of the appellants, other than the said five appellants, it is ordered that the appeal be dismissed, and the said decree affirmed, with costs.

(THIRD APPEAL.)

On the 28th June 1836 Mr. Baron Alderson made the same decree against the appellants in this appeal as he had made against the appellants in the two former appeals; from this decree the appeal was brought.

Mr. Swanston and Mr. Godson for the appellants.

Mr. Boteler and Mr. Bethell for the respondent.

4th August 1840.

LORD CHANCELLOR.—This must follow the fate of Clee and Hall; the appeal must be dismissed with costs.

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Appeal dismissed, with costs; and the said decree, so far as therein complained of, affirmed, with costs, to be paid by the appellants to the respondent.

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into the partnership good debts due to the preceding partnership to the amount of 40,000*l.* to set against debts due from such partnership, and that the appellant should bring in 4,000*l.*, and that Abraham Toulmin should be entitled to two thirds, and the appellant to one third of the profits; but that if Abraham Toulmin failed in bringing in 40,000*l.* good debts, that then the profits of the business should be divided in moieties; and that Abraham Toulmin having failed in bringing into the partnership the 40,000*l.* good debts, the partnership, from the time of its commencement to the death of Abraham Toulmin, was carried on upon equal division of the profits; and he insisted that he was entitled to a moiety of the profits of the partnership.

Before the appellant put in his answer to the said bill, and on the 29th day of January 1819, he made an affidavit, filed in the cause, in support of a motion made by him in the cause, wherein he stated to the same effect as in his answer; viz., that the profits were to be divided in thirds if the 40,000*l.* was brought into the partnership; and it goes on to state that, Toulmin having failed to bring in the 40,000*l.*, he and Toulmin afterwards agreed to divide the profits in moieties.

On the 12th June 1828 the cause came on to be heard before the Chief Baron, when, after witnesses had been examined on both sides, and extracts from the partnership books proved for the purpose of proving how the profits were divided, the Court referred it to the master to take the partnership accounts, and to inquire whether Abraham Toulmin, the testator, brought into the partnership of Toulmin and Copland 40,000*l.* of good debts which were owing to the partnership of Abraham Toulmin and Richard Toulmin, according to

the true intent and meaning of a certain agreement stated in the said affidavit of the appellant, sworn in the cause on the 29th day of January 1819, upon the footing of which their partnership commenced; and also to inquire whether the said agreement was at any time after the commencement of such partnership varied and altered, and under what circumstances and in what respects; and if he should find that there was such agreement, and that it was not afterwards altered, then that the accounts should be taken on the footing of one third of the profits to the appellant, and the remaining two thirds to the respondents; but if he should find that there was a subsequent agreement, or the 40,000*l.* good debts were not brought into the partnership, then that the accounts should be taken on the footing of the subsequent agreement, or, in the latter alternative, on the footing of their having been partners in equal moieties.

On the 26th May 1830 the master made a separate report, finding that Abraham Toulmin did not bring 40,000*l.* good debts into the partnership; and upon exceptions taken to that report the Court, on the 21st December 1830, over-ruled the exceptions, and confirmed the report; but the House of Lords, on the 30th May 1834, reversed the order of the Court of Exchequer, thereby establishing that Abraham Toulmin had brought into the partnership 40,000*l.* good debts; and thereupon the master made his separate report, on the 2d of July 1835, whereby he found, that the said Abraham Toulmin did bring into the said partnership of Toulmin and Copland the said sum of 40,000*l.* of good debts, which were owing to the said late concern which was carried on in partnership with the said Abraham and Richard Toulmin. And the said master

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also found, that the said agreement was varied and altered after the commencement of the said partnership, and that it was agreed between them, the said Abraham Toulmin and the appellant, that they should carry on and be interested in the said partnership in equal shares and proportions, and should receive and pay the profits and loss in equal moieties.

The respondents took exceptions to the said last-mentioned report; first, on the ground that he ought not to have found that the said agreement was afterwards varied or altered; and, second, that he ought to have found under what circumstances and in what respects the said agreement was varied and altered.

On the 27th day of February 1836 the Court allowed the said exceptions, and referred it back to the master to review his report, who, by his report dated the 3d November 1836, reviewed his report, and found that the agreement was not varied.

The master, by another separate report dated the 15th day of February 1836, after stating the evidence brought before him, found, that in taking the accounts between the said Abraham Toulmin deceased and the appellant, as directed by the said decree, all sums received by the firm of Toulmin and Copland from their customers and clients who had been debtors of the former firm of Richard and Abraham Toulmin, and to whom advances had been made by the said firm of Toulmin and Copland in the ordinary and necessary course of the business and practice of navy agents, should, in the first place, be applied towards the discharge of such advances and interest respectively, and that the surplus only should be applied towards the discharge of debts due from such customers and clients

respectively to the said firm of Richard Toulmin and Abraham Toulmin; but in consequence of such finding being objected to he had forborne to take the accounts of the partnership.

From the last report the respondent took, amongst others, the following exception: "For that in case the said master ought not, in and by his said report, to have found as submitted or insisted on by the said plaintiffs in their said first exception, then the said master, regard being had to the evidence laid before him, instead of his said finding, ought to have found, in and by his said report, that in taking the accounts between the said Abraham Toulmin deceased and the said defendant, as directed by the said decree, all sums received by the said firm of Toulmin and Copland from or on account of their customers and clients who had been debtors to the said firm of Richard and Abraham Toulmin, and whose debts had been transferred to their respective accounts in the said books of Toulmin and Copland, should, in the first place, be applied towards the discharge of the said debts owing to Richard and Abraham Toulmin, and of the interest thereon respectively, and that the surplus only, if any, should be applied towards the discharge of the advances and interest in the said report mentioned; and that the said firm of Toulmin and Copland, as between them and the said Abraham Toulmin, should be charged with the sums so firstly applied, and with interest thereon, from the times when the same were respectively received to the 4th day of January 1819, at the rate of 5*l.* per cent. per annum, with annual rests."

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This exception came on to be heard before the Chief Baron on the 17th of December 1836.

From the original decree of the 12th June 1828 the appellants appealed.

Extracts from the partnership books were produced in evidence, but in the general business no division had been made of profit and loss, and the same uniform mode of keeping the accounts had been adopted, except in particular items, which showed that certain losses and expenses were borne between the parties in moieties; such as in the purchase and sale of stock, and in the purchase of wines; and the purchase of wine was included under an account of "house expenses." Declarations were proved to have been made by Abraham Toulmin, that, in all cases of advances made by the firm of Toulmin and Copland to clients of the late firm, such advances should be deducted from the first remittances or receipts, on account of the clients of the old firm.

It was likewise proved by the book-keeper of the partnership books, that in December 1814 the appellant had directed him to balance the partnership books, and carry one moiety of the profits to his account, and the other to the account of Abraham Toulmin; which Abraham Toulmin must have heard, and expressed no dissent to such direction. It was on the other hand proved, on the part of the respondent, that the appellant had stated to Robert Reynolds that he, the appellant, had only brought into the concern the sum of 4,000*l.*, and that he was to receive one third of the profits.

The Chief Baron, by an order dated the 17th day of December 1836, allowed the exceptions, except where

it appeared on the face of the accounts in the books of the said firm of Toulmin and Copland, in the said master's said report mentioned and referred to, that deductions have been made from particular receipts, and the balances only carried to the credit of the account; and it was thereby referred back to the said master to review such separate report, and vary and amend the same accordingly.

From the order dated the 27th day of February 1836, the master's report dated the 3d of November 1836, and the said order dated the 17th day of December 1836, the appellant appealed, asserting that the two reports dated the 2d day of July 1835 and the 15th day of February 1836 ought to be confirmed.

Mr. K. Bruce and Mr. G. Richards for the appellants.

Mr. Simpkinton and Mr. Jacob for the respondents.

1st June 1840.

LORD CHANCELLOR.—This case came before your Lordships upon two appeals: the first appeal was from certain orders of the Court of Exchequer made in a subsequent stage of the cause; the second appeal was an appeal complaining of the original decree. That order had been made in the month of June 1828. If your Lordships should be of opinion that the original decree was wrong, it will necessarily follow that any subsequent proceedings in the cause will fail with that.

I shall proceed in the first instance to consider the second appeal, and, secondly, the points that relate to the early stage of the cause. The decree of the 12th of June 1828 merely contains a reference to the master to

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enquire whether one of the partners of the firm, Abraham Toulmin, brought into the partnership of Toulmin and Copland 40,000*l.* of good debts due from a certain partnership, according to the true intent and meaning of an agreement stated in a certain affidavit of the appellant, and whether such agreement was at any time varied.

Under that decree the master made a report, of the 26th of May 1830, in which he negatived the fact inquired into, namely, as to whether there had been this sum of 40,000*l.* brought into the concern. That report, and the accuracy of that finding, were questioned by exceptions taken, which were heard in December 1830, and over-ruled. The result therefore of the decision in the Court of Exchequer upon that subject was to negative the proposition, that a sum of 40,000*l.* of good debts had been brought into the concern of Toulmin and Copland. The order, however, of December 1830 became the subject of appeal to this House, and by an order of this House, of the 30th of May 1834, the decision of the Court of Exchequer was reversed, and the exceptions taken to the report were allowed. It, therefore, then became established, by an authority which can no longer be questioned anywhere, that Abraham Toulmin had brought into the concern 40,000*l.* of good debts, and that he had, therefore, to that extent performed the contract which he had entered into with his partner Mr. Copland.

The parties went on, and in the month of July 1835 there was a report on the second part of the inquiry, by which the master found that the agreement had been varied. That also became matter of question before the Court of Exchequer, and by an order of the 27th of

February 1836 those exceptions to the master's report were allowed. The Court of Exchequer in that instance, therefore, established the fact that the original agreement had not been varied by any subsequent agreement between the parties.

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Various other proceedings followed in the cause, till at last in the year 1837, (I am now confining my observations to the appeal against the original decree,) nine years and a half after the original decree was made, namely, the decree directing inquiries as to the fact, the appellant thought it expedient to appeal against the original decree, which is the appeal I am now considering, which was heard at your Lordships bar. Now, my Lords, that decree contained merely inquiries. It may be undoubtedly true that a decree ought not to contain a mere inquiry, and that there was either no ground for the inquiry or that some other mode of inquiry ought to be adopted. If that were so it would require a very strong case, after all the objects of the inquiry have been exhausted, and when the decree adjudicates no right, establishes no fact, but merely is an act of the court, by which the court desires that further information may be obtained,—it would require a strong case to induce your Lordships to reverse a decree merely for the purpose of ascertaining a fact, in order to enable the Court with more certainty to adjudicate between the parties.

It appears that the answer which the defendant put in to Mr. Toulmin's bill stated the contract to have been, that if Toulmin brought in 40,000*l.* of good debts, then that the partnership between them should be in thirds, Toulmin being in that case to have two

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thirds, and he, Copland, in that case to have one third; and we have now the fact, by the ultimate judgment of this House, that that 40,000*l.* was brought in, and that Copland therefore had performed his part of the contract. We have, therefore, according to the answer now, a statement in that answer denying the fact of the 40,000*l.* having been brought in; but that fact being established the case stated by the answer is, that in the event now proved to have existed the parties were to divide the profits in thirds, the present contest, however, being, on the part of Mr. Copland, that the ultimate agreement between the parties was to divide in moieties.

The affidavit referred to in the decree is an affidavit by which it is stated, that on the failure of Toulmin bringing in the 40,000*l.* a new agreement was made. It states the original agreement, namely, that the profits were to be divided in thirds if the 40,000*l.* was brought in, in the same way as the answer, but the affidavit goes on to say, that Toulmin having failed to bring in the 40,000*l.* the parties afterwards agreed to divide the profits in moieties. Now, inasmuch as it was established, by the ultimate judgment of this House, that the 40,000*l.* had been brought in according to the intent and meaning of the contract, the event never occurred upon which the parties would have entered into a new contract; and the affidavit stating that it was upon the failure of that payment,—that being an event which never took place,—it is impossible that such new contract can have been entered into between the parties.

My Lords, it was said that this affidavit was to be

taken altogether, that is to say, if it is used for the purpose of showing what the original contract was, namely, that there was a division into thirds in case the 40,000*l.* was brought in. Being to be taken together, therefore, you are bound to adopt that part of it which states the new contract. It is certain that it must be taken together, but it does not follow that, because it must be taken together, therefore every part of it is to be conclusive upon the fact of which it is evidence; the Court therefore required further information, and sent it to the master, first to exhaust the first inquiry as to the 40,000*l.*, and then directed the master to inquire whether there had been any subsequent contract entered into between the parties; that refers to the other appeal. As I have stated, the party now appealing having exhausted both subject matters, and the inquiry having failed him in both, he then complains of the Court having inquired into those facts at all.

I think that that extreme case does not occur here, in which your Lordships would be disposed to disturb a decree merely directing inquiries, after the lapse of time which has taken place, and after the result of the inquiries was contradictory to the case set up by the party. Even if it were not for the length of time, and if your lordships were called upon to express an opinion upon the original decree immediately after it had been pronounced, I should have said that it was a case of that kind, in which it was the duty of the court to inquire into the facts. The defendant having set up a defence, both parties were entitled to call upon the Court; to ascertain by inquiry the nature of that defence so set up; and that defence depending on certain facts,

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it was not possible without inquiry to come to any satisfactory conclusion upon the facts so stated. It was matter, therefore, of course, for the Court to adopt one or other mode of ascertaining the facts which were not at that moment before it, in such a way as to enable it to dispose of the case: it might have directed an issue, and that is one of the arguments; the Court was, no doubt, quite competent to direct an inquiry. But the Court directed an inquiry, and no complaint was made of the inquiry so directed until after all the subject matter was exhausted, and the party now complaining had failed to establish the facts in his favour. My Lords, I think this House will not listen to complaints brought, under the circumstances of this case, against a decree merely directing an inquiry. After all that had taken place, I think the inquiry itself perfectly proper, and upon both grounds, therefore, I think the appeal against the original decree has no foundation to rest upon, and must be, therefore, dismissed, with costs.

The first appeal in point of date, that is to say, that first presented, complains of two orders. It complains of an order of the 27th of February 1836, by which exceptions were allowed to the report of the 2d of July 1835; now, the effect of allowing those exceptions was to decide that there had been no alteration in the agreement after the commencement of the partnership. But the second appeal also complained of another order of the 17th of December 1836, which allowed the second exception taken to the report of the 15th of February 1836, by which the master had reported that all sums received by Toulmin and Copland from their customers ought to be applied in repaying the advance

of the firm, and the surplus only applied in payment of the debts due to the former firm. The effect, therefore, of the order of the court was to establish the converse of that proposition as the rule to be followed in taking the accounts. As to the order of the 27th of February 1836, it is to be observed, that Mr. Copland's affidavit rested altogether upon the allegation of a new agreement having been made, upon the assumption that the 40,000*l.* good debts had not been brought into the concern by Abraham Toulmin, but this house having decided that such assumption was unfounded, the very ground upon which the supposed existence of such new agreement was rested failed, and, after a careful examination of the evidence, I think that there is no proof of any such new agreement. I lay aside all evidence of declarations and admissions imputed to Abraham Toulmin, which are not stated in the pleadings, and which there was not, therefore, any opportunity of explaining or disproving; and in the absence of all direct evidence upon the subject, either verbal or in writing, it can only be ascertained by reference to the evidence furnished by the books themselves. The books do not contain any division of profit and loss. And here I may observe, that a new contract is supposed to have taken place at some subsequent period; now there is a total absence of any trace in the books of any altered mode of keeping the accounts: if the parties had originally been connected together according to a certain agreement as to the division of profits, and if at a subsequent period they had agreed to adopt another mode of dividing the profits, it could hardly have occurred that in the accounts there should have been throughout

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the whole of that time a complete absence of all evidence of such an altered contract having taken place between the parties. The books, however, are uniform, following the same system from the commencement to the end, and there is no alteration whatever in the mode of keeping the accounts. The books do not contain any division of profit and loss as to the general business between the parties, and so far they afford no evidence of any new contract; but in respect of particular items they do show that certain expenses and losses were charged equally to the partners. Those relate to certain losses upon the purchase and sale of stock in the public funds, and to certain wines purchased by the firm, which, it appears, were divided equally between the partners. But to this it is answered, that these purchases and sales of stock were not on the partnership account, but that they were speculations of the two partners as individuals, and that the losses were therefore properly charged in moieties to each of the two; and such appears to me to be probably the true solution, for if they were in fact partnership transactions, why were they kept separate from the other transactions of the firm, and why were the results carried to the account of each partner, when no such course was followed as to any other of the partnership transactions? It may also be observed, if the partners were to bear the result of all the transactions in moieties, why were the losses upon their stock transactions carried separately to the account of each partner? But if they were to bear their losses in moieties, and the result of the general business of the partnership in thirds, there was an obvious propriety in separating the results of these adventures from the transactions in their general business.

As to the wines which were divided between the parties the answer given was, that they were so divided to meet the expenditure in entertaining the customers of the firm, and there seems some probability for this supposition. The reference in the account to "house expenses" leads to this conclusion; but in order to make this item available proof of a new agreement for a division of the profits in moieties, it would have been necessary to have shown that the same mode of division applied to all similar cases, which does not appear upon the face of the accounts. The evidence, therefore, of a new agreement to divide the profits equally in my opinion totally fails, and the order of the 27th of February 1836 appears to me to be correct, and in my opinion the exceptions to the report of the 2d of July 1835 were properly allowed.

As to the order of the 17th of December 1836, it establishes a rule for taking the accounts consistent with the ordinary course of business, and which the law assumes to be the course to be pursued, unless there be proof of a contrary course agreed upon between the parties. Certain debts due from the customers of the house to the general firm of Richard and Abraham Toulmin were, by agreement between Abraham Toulmin upon the formation of the partnership between them, transferred into the books of the new firm as Toulmin's capital, and the transactions with such customers continued as before; monies were received on their account, and advances were made to them or payments made on their account. Without a distinct appropriation by the customers paying the money,—at least that is the general

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course of business, (in some particular instances there seems to have been an appropriation,)—but without a distinct appropriation by the customers paying the money, or an agreement between the parties prescribing a different course of proceeding, the monies so received would be applicable to the earlier debt. What, then, is the proof that there was any such agreement between the parties prescribing a different course? And here, again, I must lay aside all declarations imputed to Abraham Toulmin which are not stated in the pleadings. In the accounts of the customers the old and new debts constitute but one account, and the balance struck is the result of the two. But it is said, that in certain proceedings between Abraham Toulmin and the estate of his late partner, who had become lunatic, he had represented that the monies so subsequently received were to be first applied in repaying the subsequent advances. But it will be found that, by the objection in the exception in favour of Abraham Toulmin, he endeavoured to support this proposition upon the ground of the custom of trade as applicable to that particular business, and not of any special contract for that purpose; but the decision of the case by Lord Eldon¹ negatived any such contract or any such custom, by deciding that, as between those two branches of the firm, no doubt Abraham Toulmin being the nominal party as between himself and the estate of his late partner, there was sufficient to show that Copland was a party to the proceedings then carried on. Lord Eldon decided, upon the evidence in that case, that the monies re-

¹ Devaynes and Noble, 1 Merivale, 598.

ceived were to be applied in payment of the earlier debts; he, therefore, negatives the two grounds set up for a contrary proposition, namely, that, either by the custom of trade or by contract, it was to be applied in paying advances for the subsequent partnership. I think, therefore, that there is no proof of any special contract or any particular custom of trade to support the proposition contended for by the appellant, and the general rule of law is against it. So far, therefore, I think the order of the 17th of December 1836 correct. That order, however, allows the second exception, with an exception which I think very proper, but which is not here in question; it allowed that part of the second exception which asserted "that the firm of Toulmin and Copland, as between them and Abraham Toulmin, should be charged with the sums firstly applied, and with interest thereon, from the times when the same were respectively received to the 4th day of January 1819, at the rate of five per cent. per annum, with annual rests."

The master, by the report to which the exceptions were taken, after stating his opinion as to the manner in which he conceived that the monies received ought to be applied, stated that he had forborne to take the account till this point was decided. Now the part of the second exception to which I have referred does not relate to the question of the manner of applying the monies received, as raised by the report, but to the manner of taking the account, which the master stated he had forborne to take, consequent, indeed, perhaps upon the decision of the first point, but which is not directly embraced by it, although the master has stated he had forborne to take it. It is impossible, therefore, to say that the master, if he

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was right in making a separate report at all as to the mode of showing the receipts, ought to have reported in the terms of the latter part of the second exception to which I have alluded. I by no means wish to be understood as expressing any opinion against the proposition so raised, but before the account is taken, and without more information as to the fact, I think that it would not be safe for this House à priori to lay down that or any other proposition beyond what is necessary to decide the question raised by the report, and I have before said that it is not regular by an exception to raise a proposition foreign to the subject matter of the report excepted to. I think, therefore, that there should be a variation in the order of the 17th of December 1836, so as to make it allow the second exception, except that concluding part of it to which I have alluded, not for the purpose of expressing any opinion against the proposition so raised, but because I think it was not regular to express an opinion in that state of the cause upon an exception to such a report.

I have had a doubt whether this alteration in the order ought to protect the appellant against the payment of the costs of the appeal. The objection to the order was not put forward as a ground of the appeal in the printed case, but it was insisted on at the bar, and I think it of some importance. Upon the whole, therefore, I think that the appellant should pay the costs of the second appeal, and of so much of the first appeal as complains of the order of the 27th of February 1836, and that each party should pay their own costs with reference to the remaining part of the first appeal.

Ordered, that the appeal against the original decree below be dismissed, with costs; and the appeal against the orders of the 27th of February and 17th December 1836 be dismissed, so far as the appeal complains of the order of the 27th February 1836, with costs, and in part varied as to the order of the 17th December 1836.

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[1st and 2d June 1840.]

(From the Court of Chancery, Ireland.)

The Reverend THOMAS SMYTH, Clerk, and THOMAS JAMES SMYTH, a Minor, by the said THOMAS SMYTH his Father and next Friend, Appellants.

JOHN HYACINTH NANGLE, WILLIAM NANGLE, RICHARD MORE O'FERRALL, and GERALD DEASE, Esquires, Respondents.

Upon a bill filed to obtain the benefit of a perpetual renewal of a lease alleged to be contained in a lease granted in 1672, the lease itself being destroyed, the plaintiffs refer to the recitals in a subsequent lease as containing evidence of the covenant contained in the original lease, and pray that the covenant contained in the original lease may be decreed to have been a covenant for perpetual renewal, but make no other case by that bill, the covenant so recited in the subsequent lease not being a covenant for perpetual renewal:—Held, that two issues directed by the chancellor of Ireland, 1st, whether at the time of the execution of the original lease it was agreed that the lessor should grant to the lessee a lease for lives renewable for ever of the premises mentioned in the lease; 2d, whether, independent of the memorandum or endorsement made upon the lease, there was contained in the lease any clause, covenant, or agreement relating to the lease, were issues not consistent with the case made by the bill. The decree was reversed, and the original bill dismissed, with costs.

HENRY Pakenham, formerly of Tullenally in the county of Westmeath, esquire, deceased, having been, in and previous to the year 1672, seised in fee simple of the lands of Mayne and Fiermore, by indenture of lease, dated the 24th of May 1672, demised unto Bartholomew Cooper, his heirs and assigns, that part of the lands of Mayne, containing 148 acres of profitable land of the late Irish plantation measure, and part of Fiermore, containing twenty-five acres two roods and five perches and one third part of a perch, like measure, situate in the barony of Fore and county of Westmeath, for the lives of the said Bartholomew Cooper and Appellina Cooper his wife, and Bartholomew Cooper his son, at the yearly rent of 30*l.* for the first seven years of the said term, and 33*l.* 16*s.* 8*d.* for so many years as should after ensue during the said lives.

There was the following agreement contained in or endorsed upon the said lease:—“And it is hereby “agreed between the parties aforesaid, that upon re-
“newing or inserting of any life or lives there shall be
“paid by the said Bartholomew Cooper the father, his
“heirs or assigns, unto the said Henry Pakenham, his
“heirs or assigns, the full sum of 16*l.* 16*s.* 4*d.*, current
“and lawful money of England.”

Some time before the year 1713 Bartholomew Cooper entered into possession of the lands demised by the lease, and shortly afterwards, by endorsement on the original lease, conveyed his interest therein to Garrett Nangle of Mayne, gentleman, the ancestor of the respondent John Hyacinth Nangle.

In or about the year 1674 Appellina Cooper, one of the lives in the lease, died, and in 1695 Bartholomew

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Cooper the elder, the lessee, and one other of the lives in the lease died.

Henry Pakenham settled the lands of Fiermore, part of the lands comprised in the lease of 24th May 1672, on his son Sir Thomas Pakenham, and the lands of Mayne, the residue of said lands comprised therein, on his son the Rev. Robert Pakenham.

Robert Pakenham, by deeds of lease and release bearing date respectively the 4th and 5th days of February 1706, in consideration of the sum of 1,760*l.* granted unto Thomas Smyth the first, his heirs and assigns, the lands of Mayne.

Thomas Smyth the first, by his last will dated the 20th of February 1712, devised unto trustees therein named the lands of Mayne, to the use of his second son Thomas Smyth (called Thomas Smyth the second) for life, with remainder to trustees to preserve contingent remainders, remainder to the first and other sons of the said Thomas Smyth severally, successively, and in remainder, according to priority of birth, and their respective heirs male of their bodies, and for default of such issue to the use of his eldest son William Smyth for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of the said William Smyth severally and successively, and of the several and respective heirs male of their bodies respectively issuing, with divers remainders over. The testator died in the same year, without having altered or revoked his will.

Garrett Nangle, on the 1st day of July 1713, exhibited his bill of complaint in the Court of Chancery in Ireland against Thomas Smyth the second and others, and

thereby, after setting forth the seisin in fee of the said Henry Pakenham of and in the said lands of Mayne and Fiermore, expressly stated and put in issue, that he the said Henry Pakenham did, about the 1st day of May 1672, come to an agreement with the said Bartholomew Cooper, to make him a lease for lives, renewable for ever, of said lands and premises, and, after stating the particulars of said lease as before set forth, that the said Henry Pakenham did, on the 24th of May 1672, in pursuance and performance of the said agreement, demise the said lands to the said Bartholomew Cooper for the three lives therein named, as by the said indenture of lease, then in the custody of the said Garrett Nangle, and by his said bill stated to be ready to be produced to the Court, might appear; and the said Garrett Nangle thereby charged that it was concluded and agreed by and between the said Henry Pakenham and the said Bartholomew Cooper senior, before and at the time of making the said lease for lives, that the same should be renewable for ever by the said Bartholomew Cooper, his heirs and assigns, on the payment of 16*l.* 16*s.* 4*d.*, and charged that such agreement the more plainly appeared by its being mentioned and expressed in the said deed of lease, "that upon the renew-
 " ing or inserting of any life or lives there should be
 " paid by the said Bartholomew Cooper, his heirs or
 " assigns, the full sum of 16*l.* 16*s.* 4*d.* unto the said
 " Henry Pakenham, his heirs or assigns."

By his said bill the said Garrett Nangle also stated that the said Henry Pakenham had settled or conveyed the said lands of Fiermore to his son Sir Thomas Pakenham, and the lands of Mayne to his second son Robert Pakenham clerk, who conveyed same to

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Smyth the first to induce him to give what he did for said lands, that there was a lease for three lives only, and that said lands would be worth a great deal more at the expiration of said term.

And he insisted and was advised that he was not obliged by the said covenant or agreement in the said lease to renew to the said Garrett Nangle.

And he stated that if the said clause or agreement was not fully or skilfully worded, it was not occasioned by the mistake or ignorance of the person that drew the same, or by his being unacquainted with the form and manner of drawing a lease for lives renewable for ever, it having been drawn by the said Sir Thomas Pakenham, who was her majesty's prime serjeant-at-law, and, therefore, if it had been designed to be a lease for lives renewable for ever it would have been otherwise drawn.

And he stated that there was no other clause, except what was afore-mentioned by him in the said lease, to the purport or effect that the said Bartholomew Cooper senior, his heirs and assigns, might renew any life or lives, paying the sum of 16*l.* 16*s.* 4*d.* on the renewal, or any other to that purpose; and that he had never heard nor did he believe that the said clause before mentioned was inserted in the said lease in pursuance or performance of any agreement that the said lease should be renewable for ever.

The plaintiff proved, by Robert Pakenham, the sale by him of Mayne to Thomas Smyth the first, as being subject to a lease for lives renewable, and that the general reputation in the county was that the lease was renewable; and by the evidence of Ann Pakenham, the widow of Henry Pakenham, "that the said lease was made by her

" husband to the said Bartholomew Cooper with an
 " intention to be renewable for ever, and that she
 " having had some discourse with her husband in
 " relation to the said lease, he told her that the said
 " lease was renewable for ever." And the plaintiff also
 proved, by the evidence of Anne Beatty (the daughter of
 the said Henry Pakenham), that all the body of the said
 lease was the proper handwriting of Andrew Williams,
 who was not a person skilled in drawing leases, but was
 a parish clerk ; that she heard her father say " the
 " lease was for lives renewable ;" and heard him say,
 several years after the death of the said Appellina
 Cooper, (one of the lives in the original lease,) that he
 wondered the plaintiff in that suit did not renew his
 lease by putting in a new life, instead of the said
 Appellina Cooper. The plaintiff also proved, by the
 evidence of Edward Pakenham, that the said Andrew
 Williams was a parish clerk, and no way skilled in
 drawing leases, and that it was the intent of the said
 Henry Pakenham and Bartholomew Cooper that the
 said lease should be for lives renewable for ever.

The cause was heard in the Court of Chancery in
 Ireland on the 22d, 26th, 27th, and 28th days of
 November 1716, the lease of the 24th May 1764
 having been proved and read upon the hearing of the
 cause.

On the 28th day of November 1716 it was decreed
 by the then Lord Chancellor of Ireland, that the said
 Thomas Smyth should perfect unto the said plaintiff,
 Garrett Nangle, a lease or leases of the said lands of
 Mayne, demised by the said Henry Pakenham to
 Bartholomew Cooper for the lives of Thomas Nangle

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and Patrick Cashell in the room of Bartholomew Cooper the elder and Appellina Cooper, the plaintiff paying a proportion of the rent and of the fines payable by the said lease in respect of the said lands of Mayne, regard being had to the said lands of Fiermore, without costs on either side; "and his lordship was thereby pleased " to declare, that he did not establish the said lease was " a lease for lives renewable or not."

In pursuance of the decree Thomas Smyth the second, by indenture of the 8th of April 1719, and in consideration of 28*l.* 15*s.* 5*d.*, after reciting said lease of the 24th day of May 1672, and that the same contained a clause or agreement to the purport and effect before mentioned, namely, "that upon the renewing or inserting " of any life or lives, there should be paid by the said " Bartholomew Cooper the father, his heirs or assigns, " the full sum of 16*l.* 16*s.* 4*d.*," and after reciting the said decree, the said Thomas Smyth, in obedience to the said decree, did grant unto the said Garrett Nangle, his heirs and assigns, the said lands of Mayne, containing 148 acres of profitable land and 23 acres 13 perches of unprofitable land, for the life of Bartholomew Cooper and the lives of Thomas Nangle and Patrick Cashell, at the yearly rent of 28*l.* 10*s.* 3½*d.*

A memorial of the indenture of the 8th of April 1719 was registered in Ireland, and described as "a memorial " of an indenture of renewal, bearing date and per- " fected the 8th of April 1719, made between the " Rev. Thomas Smyth of the city of Dublin, clerk, of " the one part, and Garrett Nangle of Mayne in the " county of Westmeath, esq., of the other part, annexed " to a lease for lives renewable for ever, dated the four

“ and twentieth day of May one thousand six hundred
 “ and seventy-two.” Signed by Garrett Nangle, but
 not by Thomas Smyth the second.

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The said Bartholomew Cooper the younger, the last remaining life in said lease of the 24th of May 1672, having died, Thomas Smyth the second, by indenture bearing date the 5th day of May 1752, after reciting said lease of the 24th of May 1672, and that same contained an agreement in the precise words before set forth, and after reciting said decree and said indenture of the 8th of April 1719, so executed in pursuance thereof, in pursuance of the covenant of renewal in the said original lease contained, granted unto Hyacinth Nangle (the grandson and heir of Garrett Nangle), his heirs and assigns, the said lands at Mayne, for the lives of the said Thomas Nangle, Patrick Casbell, and his royal highness George Prince of Wales, and the survivors and survivor of them; and in this last-mentioned indenture the following agreement is contained:—

“ It is hereby agreed between the parties aforesaid,
 “ that upon the renewing or inserting of any life or
 “ lives there shall be paid by the said Hyacinth Nangle,
 “ his heirs or assigns, unto the said Thomas Smyth,
 “ his heirs or assigns, the full sum of 14*l.* 17*s.* 8½*d.*
 “ current and lawful money of England,” being the
 sum apportioned for the renewal fine by the said decree
 in 1716.

Thomas Nangle, one of the lives named in said indenture of the 8th of April 1719, having died, Thomas Smyth the second, by indenture dated the 2d day of March 1754, after reciting to the effect mentioned in the lease of 1752 and the indenture of 5th of May 1752, in

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pursuance of the covenant for renewal in the said original lease contained, and in consideration of 14*l.* 7*s.* 8½*d.*, did release unto the said Hyacinth Nangle, his heirs and assigns, the said lands of Mayne for the lives of Patrick Cashell, George Prince of Wales, and Prince Edward his brother, and the survivors and survivor of them, with a similar clause as to renewal as is contained in the lease of 1752.

Some time after the execution of the indenture of the 2d of March 1754 the house of Hyacinth Nangle, at Streamstown in the county of Westmeath, was set fire to and burnt, and Hyacinth Nangle was murdered, and all the title deeds therein, including the original lease of the 24th of May 1672 and the renewals thereof, were burnt or destroyed.

Hyacinth Nangle left an only child, Christopher Nangle, then a minor, him surviving.

William Smyth, the eldest son and heir-at-law of Thomas Smyth the first, and to whom Thomas Smyth the first had devised certain estates in his said will mentioned for life, to take effect in possession immediately on the decease of Thomas Smyth the first, with remainder to his first and other sons successively in tail male, died in the lifetime of his next brother Thomas Smyth the second, leaving an eldest son Thomas Smyth (called Thomas Smyth the third), who, as the first tenant in tail of the said estates which had been so devised directly to his father the said William Smyth for life, became entitled thereto in possession on the death of his said father William Smyth, and thereupon, having duly barred the estate tail and all remainders over under said will, acquired the fee in the said estates so devised to his said father for life by the will of said Thomas

Smyth the first, and was also entitled to an estate tail in remainder in the lands so as aforesaid devised to the said Thomas Smyth the second for life, expectant on the death of the said Thomas Smyth the second without issue male.

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The said Thomas Smyth the third being entitled to such estates in possession, and to the said lands of Mayne and other estates in reversion expectant upon the death of Thomas Smyth the second, upon and previous to his marriage with Miss Martha Hutchinson, made and duly executed an indenture of release and settlement bearing date the 10th day of March 1764, whereby he conveyed the several lands therein mentioned to trustees therein named upon trust, to the use of himself for life, with remainder to trustees to preserve contingent remainders, with remainder, subject to a jointure for the said Martha Hutchinson and to the powers and remedies for recovery thereof, to the use of the first and other sons of the said Thomas Smyth the third by the said Martha Hutchinson in tail male, with divers remainders over.

This last-mentioned settlement contains a proviso, that in case the said Thomas Smyth the third should outlive the said Thomas Smyth the second, and thereupon, and by suffering a recovery thereof, the lands then possessed by the said Thomas Smyth the second should become vested in the said Thomas Smyth the third in fee, it should be lawful for the said Thomas Smyth the third to revoke the limitations thereby declared concerning the lands therein comprised, and to limit and settle the lands then in the possession of the said Thomas Smyth the second upon the same trusts

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and for the same estates as the several lands therein comprised then stood limited.

In the latter end of the year 1764, and shortly after the execution of said settlement, Thomas Smyth the second died without issue, whereupon Thomas Smyth the third became seised of an estate tail male in possession in the lands of Mayne and the other lands devised to the said Thomas Smyth the second for life by the will of the said Thomas Smyth the first; and the said Thomas Smyth the third, in or as of Hilary term 1765, levied a fine and suffered a common recovery of all said last-mentioned lands, and acquired an estate in fee simple therein.

In pursuance of the proviso contained in said settlement of the 10th of March 1764, for revoking the limitations thereof as regarded the lands therein comprised, and settling said last-mentioned lands in lieu thereof, Thomas Smyth the third made and duly executed an indenture of release and settlement, bearing date the 8th day of March 1766, and did thereby revoke and make void the several trusts declared in the said indenture of the 10th of March 1764 concerning the lands and premises therein comprised, and did thereby grant and release unto trustees therein named the lands of Mayne and the several other lands therein mentioned upon trust, to the use of the said Thomas Smyth the third for life, with remainder to trustees to preserve contingent remainders, with remainder, subject to a jointure for the said Martha Hutchinson and to the powers and remedies for recovery thereof, to the use of the first and other sons of Thomas Smyth the third by the said Martha Hutchinson, in tail

male and in strict settlement, with divers remainders over.

In or about the year 1768, Prince Edward having died, Thomas Smyth the third, by indenture bearing date the 2d day of April 1768, after reciting to the effect mentioned in the lease of 1754, and after reciting the said indenture of the 2d of March 1754, in pursuance of the covenant of renewal in the said original lease contained, and in consideration of 14*l.* 7*s.* 8½*d.*, did release unto Christopher Nangle, the only child and heir-at-law of Hyacinth Nangle deceased, a minor, the lands of Mayne for the lives of the said Patrick Cashell, his said royal highness George Prince of Wales, then George the third, and of his royal highness William Henry Duke of Gloucester, and the survivors and survivor of them, with a similar clause for renewal as is contained in the two former leases.

Thomas Smyth the third executed a memorial of said last-mentioned indenture of the 2d of April 1768, which was registered in the public registry office for registering deeds in the city of Dublin, on the 22d of April 1768.

Thomas Smyth the third, Patrick Cashell having died in or about the year 1768, by indenture of lease dated the 25th day of December 1768, after reciting the said original indenture of lease of the 24th of May 1672, and that it was by the said indenture of lease agreed, that upon renewing or inserting of any life or lives there should be paid by the said Bartholomew Cooper the father, his heirs or assigns, unto the said Henry Pakenham, his heirs or assigns, the full sum of 16*l.* 16*s.* 4*d.* sterling; and after reciting the said decree and said indenture of the 8th day of April 1719, the 5th day of

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May 1752, the 2d day of March 1754, 2d day of April 1768, and that Patrick Cashell was dead, and that the life of Christopher Nangle was nominated in his place, the said Thomas Smyth the third, in pursuance of the covenant for renewal in said original lease contained, and in consideration of 14*l.* 7*s.* 8½*d.*, did release unto the said Christopher Nangle the said lands of Mayne for the lives of King George the third, his royal highness William Henry Duke of Gloucester, and of the said Christopher Nangle, and the survivors and survivor of them.

And in the said last-mentioned indenture is contained the following clause:—"And it is thereby agreed between the parties aforesaid, that upon the renewing or inserting of any life or lives there shall be paid by the said Christopher Nangle, his heirs or assigns, unto the said Thomas Smyth, his heirs and assigns, the full sum of 14*l.* 7*s.* 8½*d.* current and lawful money of England."

On the 29th July 1774 Thomas Smyth the third filed his original bill for the purpose of having the boundaries ascertained between the said lands at Mayne and certain lands at Coole, alleging that Garrett Nangle and Hyacinth Nangle were severally and successively in possession of lands of Coole adjoining the lands of Mayne, as tenants to the said Thomas Smyth the second and Thomas Smyth the third, under determinable leases for twenty-one years, and that during the continuance of such leases they had defaced the ancient meerings between the said lands of Mayne and Coole, and had annexed part of the lands of Coole to the said lands of Mayne.

On the 6th of August 1779 the bill was amended,

and it was therein stated that the lands of Mayne were held under a lease for three lives, with a covenant for a perpetual renewal. The suit was not prosecuted to a decree, an amicable adjustment having been made.

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Some time in the year 1782 or 1783 Thomas Smyth the third died, leaving Thomas Hutchinson Smyth his eldest son, who, having suffered a common recovery of the lands in Mayne, in contemplation of a marriage afterwards had with Miss Abigail Hamilton, by an indenture of release and settlement, bearing date the 27th day of February 1796, granted and released unto trustees therein named the said lands of Mayne and other estates therein comprised, upon trust, to the use of himself the said Thomas Hutchinson Smyth for life, with remainder to trustees to preserve contingent remainders, with remainder, subject to a jointure thereby provided for the said Abigail Hamilton and to the powers and remedies for securing the same, and in default of such appointment as therein mentioned, to the use of the first and other sons of the said Thomas Hutchinson Smyth by the said Abigail Hamilton, his intended wife, and the heirs male of such first and other sons in tail male, and in default of such issue to the use of the said Thomas Hutchinson Smyth in fee.

William Henry Duke of Gloucester having died some time prior to the year 1806, Thomas Hutchinson Smyth, by deed dated the 16th day of January 1806, and purporting to be made between the said Thomas Hutchinson Smyth of the one part and the said Christopher Nangle, the lessee in the annexed indenture, of the other part, after reciting that William Henry

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Duke of Gloucester, one of the cestuique vies in the annexed indenture, was dead, and in order to fill up the three lives pursuant to the covenant for perpetual renewal in said annexed indenture mentioned, the said Christopher Nangle had nominated his eldest son John Nangle, and in consideration of a fine of 14*l.* 7*s.* 8½*d.*, the said indenture witnessed, that, in pursuance of the said covenant for perpetual renewal, and in order to fill up the said three lives agreeable thereto, the said Thomas Hutchinson Smyth added and inserted to the time or term of said grant or demise the life of the said John Nangle then nominated, and released unto Christopher Nangle, his heirs and assigns, the lands of Mayne, for the lives of King George the third, of Christopher Nangle, and John Hyacinth Nangle, and the survivors and survivor of them.

On the death of George the third Thomas Hutchinson Smyth, by indenture bearing date the 12th day of August 1820, and made between the said Thomas Hutchinson Smyth of the one part, and the said Christopher Nangle, who is therein again described as the lessee in the annexed indenture named, of the other part, after reciting that George the third was dead, and in order to fill up the three lives, pursuant to the covenant for perpetual renewal in the said annexed indenture mentioned, and in consideration of a fine of 14*l.* 7*s.* 8½*d.* did add the life of William Nangle, and did release unto Christopher Nangle, his heirs and assigns, the lands of Mayne, for the lives of Christopher Nangle, John Hyacinth Nangle, and William Nangle, and the survivors and survivor of them.

In the month of October 1830 Thomas Hutchinson Smyth died, leaving Thomas Smyth the fourth his

eldest son, who, having suffered a recovery of the lands in Mayne, and in contemplation of his marriage with Miss Mary Anne Gibbons, which was afterwards solemnized, made and duly executed an indenture of release and settlement, dated the 2d day of August 1832, whereby he granted and released unto trustees therein named the said lands of Mayne and the several other lands therein comprised, upon trust, to the use of himself for life, with remainder to trustees to preserve contingent remainders, with remainder, subject to a jointure for the said Mary Anne Gibbons, in case she should survive the appellant Thomas Smyth the fourth, and to the powers and remedies for recovery thereof, and to a trust term for better securing the same and raising portions for younger children, to the use of such of the sons of the appellant Thomas Smyth the fourth by the said Mary Anne Gibbons as the said appellant Thomas Smyth the fourth should appoint; and in default of such appointment, to the use of the first and other sons of the said marriage, and the heirs male of such first and other sons, in tail male.

On the 12th day of June 1836 Christopher Nangle, the last surviving cestuique vie named in the before-mentioned indenture of renewal of the 25th day of December 1768, died, having previously made his will, bearing date the 2d day of July 1828, whereby he devised all his estates therein, including his interest in the said lands of Mayne, to the respondents Gerald Dease and Richard More O'Ferrall, their heirs and assigns, in trust, to the use of his eldest son, the respondent John Hyacinth Nangle, for life, with remainder to his first and other sons in tail male,

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with remainder to testator's second son William Nangle for life, remainder to his first and other sons in tail male.

On the 8th day of July 1836 John Hyacinth Nangle applied to Thomas Smyth the fourth to execute a new lease of the lands of Mayne for a life to be nominated by him in place of Christopher Nangle deceased; but Thomas Smyth the fourth, conceiving that John Hyacinth Nangle had possessed himself of more lands than were comprised in the original lease of the 24th day of May 1672, refused to grant a renewal of the leases until it was ascertained what lands John Hyacinth Nangle was entitled to beyond those comprised in the original lease.

On the 28th day of November 1836 the respondents John Hyacinth Nangle, William Nangle, Richard More O'Ferrall, and Gerald Dease filed their original bill against the said Thomas Smyth the fourth, and which was amended in June 1836, setting forth the original indenture of lease of the 24th of May 1672, and that therein was contained a covenant on the part of the said Henry Pakenham with the said Bartholomew Cooper for the perpetual renewal thereof on payment of half a year's rent, as by the said original lease which had been burnt or destroyed, if it could be produced, would appear, and as appeared by a recital thereof in the indenture of the 25th day of December 1768, thereafter set forth.

The respondents by said bill then proceeded to deduce the title of the lessor and lessee to the said lands of Mayne, and in so doing particularly stated and set forth the several indentures of the 8th day of April 1719, 5th of May 1752, and 2d of March 1754, and in so

doing averred that the same had been burned or destroyed, and particularly referred to the recitals of the said several indentures in the said indenture of the 25th day of December 1768 as conclusive evidence of the contents thereof.

The respondents, by their said bill, after stating the said indenture of the 2d day of April 1768, and particularly setting forth the said indenture of the 25th day of December 1768, stated that the said last-mentioned indenture, viz., the indenture of the 25th of December 1768, contained full recitals of the several indentures therein-before set forth and stated to have been burned or destroyed, and submitted that the appellant Thomas Smyth the fourth was bound and estopped by the recitals contained in the said last-mentioned indenture of the 25th of December 1768.

And after the several other statements in said bill contained, the respondents prayed that the covenant for renewal might be decreed to have been a covenant for perpetual renewal.

The appellant Thomas Smyth the fourth by his answer admitted that the lease of the 24th May 1672 had been executed by the said Henry Pakenham to the said Bartholomew Cooper, and that there was contained in said lease or endorsed thereupon a clause or memorandum in the words or to the purport following, that is to say:—"and it is hereby agreed between the parties aforesaid, that upon the renewing or inserting of any life or lives there shall be paid by the said Bartholomew Cooper the father, his heirs or assigns, unto the said Henry Pakenham, his heirs or assigns, the full sum of 16*l.* 16*s.* 4*d.* current and lawful money

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“ of England ;” but appellant denied that there was contained in or endorsed upon said lease any other or further covenant in anywise relating to the renewal of said lease than the covenant or memorandum aforesaid.

And after deducing his title to the fee and inheritance of said lands of Mayne as herein-before stated, he submitted that he was not bound by the aforesaid agreement or memorandum, and the true construction thereof, to execute any renewal to the respondents, and that he was not bound by the renewals, inasmuch as the same were made by persons having only estates for life.

After the appellant had filed his answer insisting that the said indenture of the 24th of May 1672 did not contain any covenant or agreement in anywise relating to the renewal thereof, except the clause or memorandum aforesaid, and that the said clause or memorandum was not a covenant for perpetual renewal, the respondents, on the 23d day of June 1837, amended their said bill upon the file, by introducing the following words at the commencement of the prayer ; viz., “ that the “ covenant for renewal contained in the said original “ lease may be decreed to have been a covenant for “ perpetual renewal.” And by such amendment the respondents made the appellant Thomas James Smyth, a minor, and Francis Smyth, James Gibbons junior, and the Rev. Robert Pakenham parties defendants, and prayed an injunction to restrain the appellants from proceeding at law.

On the 1st day of July 1837 the appellant Thomas Smyth the fourth filed his answer to such amendments.

In Easter term 1837, the appellant Thomas Smyth the fourth brought his ejectment in the Queen's Bench for the recovery of the possession of the lands of Mayne.

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This ejectment was tried at the Mullingar summer assizes in the year 1837 before Mr. Baron Foster, who in charging the jury stated, that the question whether the defendant Nangle had now a valid subsisting title to the possession of the lands sought to be recovered, must depend upon whether the leases of 1806 and 1820, or either of them, were good and subsisting leases on the days in the declaration mentioned, which depended on the fact whether there was or was not a covenant for perpetual renewal in the lease of 1672; and in case there was such a covenant in the said lease, it then became a question for the Court, and not for the jury, and thereupon directed the jury to consider the leases of 1806 and 1820 as good and subsisting leases.

The plaintiff excepted to this charge, insisting that the judge should have told the jury that there was not any covenant for perpetual renewal contained in the lease of 1672, or in the renewal of 1768, or in any other renewal; and that the renewals of 1806 and 1820 were not good and valid leases, first, as having been made by a tenant for life under the settlement of 1796, and, secondly, as not having been made in pursuance of the leasing power contained in that settlement.

On the 23d day of January 1838 the defendant Francis Smyth filed his answer to the said original amended and supplemental bills.

On the 3d day of February 1838 the defendants

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James Gibbons and the Rev. Robert Pakenham filed their joint and several answer to said original amended and supplemental bills, and upon the same day the appellants Thomas Smyth the fourth and Thomas James Smyth, a minor, filed their joint answer to said supplemental bill, and the appellant Thomas James Smyth also answered said original and amended bills, by which said answer the appellant Thomas Smyth the fourth submitted, that as there was not any covenant for perpetual renewal in said lease of 24th May 1672, no subsequent events could construe it to have been such, and that the jury had found for the defendant in such ejectment cause upon the misdirection of the baron who tried the same.

On the 2d day of March 1838 the plaintiffs filed their replication in said cause, and evidence was gone into on the part of the respondents and appellants; and publication having passed in the cause, the same was set down to be heard upon pleadings and proofs as to the appellants, and upon bill and answer as to the other defendants.

On the 22d day of May 1838 an order was made in this cause, on consent, that the parties should be at liberty to read as an original document the copy of the will of Thomas Smyth the first; and the cause came on to be heard before the Lord Chancellor of Ireland on Friday the 25th day of May 1838; but the bill of exceptions taken to the charge of the learned baron who tried the ejectment cause being in course of argument before the Court of Queen's Bench in Ireland, the hearing of this cause was from time to time adjourned until the argument in said law cause should be closed, and the judgment of the Court of Queen's Bench

upon the construction of the said clause or memorandum, being the point raised by the bill of exceptions, should be pronounced.

On the 13th day of June 1838 the Court of Queen's Bench, after argument, gave judgment on the said bill of exceptions, in which the Court gave it as their opinion, that there could be no reasonable doubt that the terms of the renewal covenant contained in the lease of 1672 were such as they were recited to have been by the renewal lease of 1768, and in conformity with the renewal covenant contained in that lease; and the Court were of opinion that the terms of that covenant did not amount to or warrant the construction of such a covenant being a covenant for perpetual renewal; and the Court stated that the jury should have been directed that the terms of the covenant, as the same were recited in the lease of 1768, did not amount to a covenant for perpetual renewal, and that, although the Court could not but feel a disposition to sustain a construction to which the acts of parties appeared for a length of time to have given countenance, the Court did not see sufficient grounds to adopt it; and the verdict of the jury having been founded upon a direction leading to a misconception of the construction of that covenant, the Court thought that the exceptions so taken by appellant Thomas Smyth the fourth should be allowed, and a venire de novo awarded. Bell, on the demises of Thomas Smyth and others, v. John Hyacinth Nangle.¹

The cause came on to be heard before the Lord Chancellor of Ireland on the 3d day of November

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1838, and to be further heard on the 5th, 6th, 7th, and 8th days of November 1838, and on the 22d day of December 1838 it was decreed by the Lord High Chancellor of Ireland, that the respondents bill should be retained for six months, with liberty for the respondent John Hyacinth Nangle to commence a feigned action at law against appellants, to which the appellants should appear gratis and plead the general issue, and to admit all matters of form, so that a trial might be had between the said parties to try the following issues : —first, whether at or before the time of the execution of the lease dated the 24th day of May 1672, in the pleadings mentioned, it was agreed between Henry Pakenham, the lessor in that lease, and Bartholomew Cooper, the lessee therein, that the said Henry Pakenham should grant to the said Bartholomew Cooper, his heirs and assigns, a lease for lives renewable for ever of the lands and premises in the said lease mentioned ; and secondly, whether, independent of the memorandum or endorsement made upon said lease, whereby it was agreed by and between the parties thereto that for the renewing or inserting of any life or lives there should be paid by the said lessee, his heirs or assigns, the sum of 16*l.* 16*s.* 4*d.*, there was contained in the said lease of the 24th day of May 1672 any clause, covenant, or agreement relating to the renewal of said lease to the lessee, his heirs and assigns ; the parties to the said action to be respectively at liberty to give in evidence on the trial of such issues all the evidence used by the said parties on the hearing of this cause ; the said issues to be tried by a special jury of the county of Westmeath ; and the judge before whom such trial should be had should certify to the said court the verdicts to be

had on the said issues respectively; and his Lordship was pleased to reserve all further directions until the return of said judge's certificate.

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From this decree the present appeal is brought.

Sir William Follett and Mr. Jacob for the appellants.—

These issues cannot be supported; there is no agreement between the parties distinct from the lease. The plaintiffs do not make out a case upon their bill for a perpetual renewal.

Appellants
Argument.

The case put upon the record is, that the covenant contained in the several leases, is a covenant for a perpetual renewal, and that case has failed. The proceedings in the Court of Chancery in 1718 show that there was no covenant for perpetual renewal. Two allegations have been resorted to which are not on the record; first, a parol agreement for a perpetual renewal, second, that there might be some other covenant than that contained in the original lease.

The lease executed supersedes any parol agreement, unless evidence of reputation can be admitted to contradict a written instrument; the only endorsement on the original lease was an assignment of Bartholomew Cooper's interest in the lease to Garrett Nangle.

The different renewals which were made by the Smyth family were made in ignorance of their rights; and the acts of the parties cannot convert what is not a covenant for perpetual renewal into a covenant for perpetual renewal, *Iggulden v. May*.¹ Lord Alvanley would not

¹ 9 Ves. 325; 7 East, 237.

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allow a deed to be construed by the acts of the parties, *Baynham v. Guy's Hospital*.¹ The Lord Chancellor said he could not come to any satisfactory conclusion, and therefore directed these issues. Supposing the jury were to find that there was another agreement, could the Chancellor act upon it? There can be no living witnesses to examine. If there is documentary evidence the Court itself ought to decide upon it; no parol evidence can be received independent of the statute of frauds; a solemn written agreement cannot be added to by a parol agreement. Most of the leases granted by tenants for life, therefore, no evidence against us, and the Lord Chancellor adopts as a fact in one of the issues what is pure hypothesis, that there is a memorandum or endorsement on the original lease.

Respondents
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Mr. Pemberton and Mr. Wakefield for the respondents.—From 1713 to the present time there never has been a doubt of the right of the Nangle family to a renewal; each side has treated it as a perpetual interest, and it is not a violent presumption that there was some collateral agreement for a perpetual renewal.

There is no objection to a parol agreement in Ireland; there was at that time no statute of frauds. In 1754 the lease was destroyed, and the lessee was not able to produce the original lease; but it is remarkable that the lessor produces no counterpart.

(LORD CHANCELLOR.—There is no evidence that they have the lease.)

They do not account for not producing it.

¹ 3 Ver. 295.

(LORD CHANCELLOR.—If you had asked them for it they might have accounted for it.)

In the proceedings in Chancery in 1713 the Court, by decreeing that two lives should be added, determines that there is some engagement for a perpetual renewal, otherwise there would be great injustice in adding two lives. In 1752 the same party, who was litigating the point, acquiesces in the claim, and grants a renewed lease; all the leases have been taken as if there was a covenant for perpetual renewal, and though there have been disputes as to boundaries, no dispute has ever arisen in respect of a renewal of the leases. From the numerous renewals which have taken place the Court would presume a covenant for perpetual renewal. *Attorney General v. Bishop of Ely*¹, *Ball v. Lord Devonshire*.² Where the question of right in a suit is a mere legal question dependent upon written evidence, the House of Lords held that it was right to send it to law to be tried upon a proper issue. *Collins v. Saurey*³, *Burkett v. Randall*.⁴

(LORD CHANCELLOR.—I have looked over the original and amended bill, and I do not find any such case made by your bill as you are arguing.)

We have put the case sufficiently in issue. The plaintiffs by their supplemental bill state, that the defendants pretend that the lease of 1672 does not contain any covenant for perpetual renewal.

(LORD CHANCELLOR.—But they do not charge that the pretence was untrue.)

The Court might give us leave to file a supplemental bill.

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¹ 4 Russell, 102.

² Lynes App. on Gen. 61.

³ 4 Brown's P. C. 692.

⁴ 3 Merivale, 466.

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(LORD CHANCELLOR.—It could not be done by supplemental bill; but your bill must be dismissed, without prejudice to your filing another bill.)

Sir William Follett in reply.—A supplemental bill would bring forward a case totally inconsistent with the case made in 1713. Mr. Foster, the judge, thought the covenant was a covenant for a perpetual renewal, and the bill is framed upon that view of the subject. The original lease was produced in 1713, and in the answers to the bill filed in 1713 the covenant contained in the original lease is set out, and it is denied that there was any agreement for a perpetual renewal. This is not a case of presumption, like the bishop of Ely's case. To presume that the lease contained such a covenant would be inconsistent with the deed; further litigation would answer no additional purpose; no additional evidence can be produced. There are many instances in church lands of families holding leases for centuries, and yet from that holding no presumption of a right to a perpetual renewal arises; it is the practice always to recite the renewal covenants in a new lease. Nothing can be wilder than the first issue, to leave to a jury to say there was an independent agreement; the whole evidence is before the Court. Nothing further can be elicited; the result must be the same, and only additional expense incurred.

Tuesday, 2d June 1840.

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Speech.
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LORD CHANCELLOR.—This suit was instituted to obtain the benefit of a perpetual renewal of a lease which had been agreed for, as alleged, in 1672; and since the case was argued yesterday I have taken ad-

vantage of the interval to look through the pleadings, and I think our judgment must be regulated by the pleadings, and the pleadings alone, because it would be very dangerous to listen to the arguments urged at the bar, that a different rule of pleading is to be followed regarding matters of equity, whether the cause comes from Ireland or from England. The rules of pleading for this purpose are essential to the due administration of justice, in order to give to each party the opportunity of knowing the case which he has to meet. Now, when this case comes to be investigated, there is no such objection, and when I threw out that the House might be disposed to dismiss the bill without prejudice to the party filing another bill, it was certainly on the supposition that the form of the bill might have been more advantageously framed if it had assumed a different shape; but when I come to consider what appears on the proceedings of 1713, I am quite satisfied that the gentleman who drew this bill, having those proceedings before him, could not have drawn the bill in a way which would have led to a more beneficial result to his client than the course he has adopted.

Now, the order of the Lord Chancellor of Ireland directed certain issues to be tried, and the question is, whether these issues are at all consistent with the case made by the bill, one of the issues being to inquire, whether there was an agreement independently of the lease at or before the period of the lease of 1672; and the other, whether that lease contained any other provisions besides that memorandum, which, it appears, the *plaintiff* states to have been either included in or attached to that lease.

When we look to the bill itself it does not open the

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door to any one or other of these inquiries; it confines the plaintiff's case strictly to what the plaintiff alleges to have been contained in that lease of 1672. The bill states that lease, and then states that it contained a covenant for perpetual renewal, and refers to a subsequent lease of the 25th of December 1768 as evidence of the alleged contents of that first lease. Now, if the bill had stopped there, if there was nothing further, no further allegation on the subject, it might have been open to the observation of Mr. Wakefield, that it was an allegation that the original lease contained a covenant for renewal, and referred to the renewed lease of 1768 as evidence of its containing such a covenant. But the subsequent part of the bill entirely excludes such a supposition, for, in mentioning the renewal, it is always mentioned to be "in pursuance of said covenant." In page 27 it states "your suppliants do not possess any "copies or copy thereof, or any of them, or any "evidence of the contents thereof, save the recitals "thereof contained in the said indenture of the "25th day of December 1768 herein-after mentioned, "but which recitals your suppliants submit is conclusive evidence of the contents thereof for the reasons herein-after set forth." Then in a subsequent page it states, that the last-mentioned indenture of renewal contains full recitals of the several indentures herein-before set forth or mentioned, and "herein-before stated to have been burned or destroyed," which includes the lease of 1672; and having been executed by Thomas Smyth, your suppliants submit that Thomas Smyth is bound and stopped by the recitals contained in the last-mentioned indenture of renewal. Then the bill prays, "that the

“ covenant for renewal contained in the said original
 “ lease may be decreed to have been a covenant for
 “ perpetual renewal.”

Now, it is impossible to read that bill and put any other construction on it than this,—that which appears in the renewed lease of 1768 is a copy of that which is contained in the lease of 1672. We have not got the deed of 1672 ; it was burned or destroyed ; but we state that we know what it contains, because that deed of 1768 contains all the recitals and statements in that deed ; and then having got that covenant from the deed of 1768 the bill prays that the covenant contained in the original lease, alleged to be identical with that which is stated in the renewed lease of 1768, may be declared to be a covenant for perpetual renewal. The whole case of the plaintiff is put on the construction of that covenant, which is stated by the plaintiff to be identified and ascertained by the renewed lease of 1768. When that case fails it is not attempted at the bar to be argued that that covenant is a covenant for perpetual renewal, or that it gives the plaintiff any title to the relief which he claims by this bill. Now, what have the issues tendered by this bill to do with the construction of the covenant ? They have nothing to do with the construction of the covenant ; they find out a case for the plaintiff totally dehors the bill.

Then it occurred to me, certainly, that if the bill had assumed a different shape, and if the bill had stated that the deed was lost, (but through the dealings between the parties an inference ought to be drawn that that deed contained a covenant for perpetual renewal,)

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and they had brought forward evidence for the affirmative of that proposition,—that a large and reasonable inquiry might have been open to the plaintiff, which might have justified the inquiries directed by those issues. But then, when we look at the earlier history of this transaction, and look at what passed in the year 1713, when the original lease existed, when the parties had it to produce, when they were as much interested in making the most of that lease as at the present moment, it is quite clear there is no room for any presumption that the deed itself, then in possession of the parties, contained any other covenant than that which is contained in the renewed lease of 1768. The complaint being not of any covenant that is contained in it, but the bill prays for relief on the ground of some mistake or error in the person employed to prepare the lease, and asks for relief on the ground of that supposed error. Why, there was no error in the covenant for renewal, which is all the plaintiff asks for. He states that which appears in the renewed lease of 1768, and asks for relief on the ground of that not being properly adapted to the purpose the parties had in view. That shows that no further investigation, nor any other form of suit, could possibly enable the plaintiff to have that which he asks; and the person who prepared this subsequent bill had good reason for not opening a door for further inquiry, knowing that the proceedings of 1713 would show that there was no other ground on which the plaintiff's case could by possibility succeed.

No doubt, after possession has been held for so long a time, and parties have supposed they have a title which

they have not, courts of justice are anxious to take care that no conclusion of wrong may be done consistently with the original right of the parties; and where the dealing presupposes that there are grounds of title which are not capable of being proved, they would give the party every opportunity of proving the history of that title. Such, however, is not the title now set up by the plaintiff, and I think it would be improperly encouraging litigation to allow the plaintiff to file a bill which he will not be able to sustain. If he has any other ground of equity, or a case generally which enables him to make a new title to new relief, under those circumstances the dismissal of this bill will not prejudice him. I think it much fairer, considering the circumstances of the transaction, not to hold out any hope to the plaintiff of proceeding in a case which, according to the rules of practice, he would be precluded from proceeding with by the dismissal of this bill. I therefore propose to your Lordships, that this decree should be reversed, and the original bill dismissed, with costs.

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LORD BROUGHAM.—I entirely agree with what my noble and learned friend has stated, in the opinion he has given as the result of this case, in every particular. It has been said, that certain inattention or negligence, or slovenliness, as was stated in one part of the observations, has been found to prevail in other parts of the United Kingdom in the drawing of pleadings, and that on that account your Lordships ought to apply a different rule to cases coming from that part of the kingdom than to cases coming from nearer home. My

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Lords, I should say, if it were so (which I very much doubt),—if it were so, that would be an exceedingly dangerous course for your Lordships to take, for it would be the means of perpetuating that negligence, or at least slovenliness, which it is suggested there exists; I do not believe it exists, but if it does exist, your Lordships, by having one rule of pleading for Ireland and another for Westminster Hall, would undoubtedly perpetuate that neglect.

But I see no evidence whatever of this in the present case; I see nothing whatever of that defect in the present pleadings; the defect is not in the draughtsman but in the party, not in the bill but in the case. The bill appears to me to meet the facts of the case, and no doubt it is unfortunate to the party that it must be so framed; but the case being defective in that essential particular, which has been pointed out by my noble and learned friend, the bill is defective in that particular, as the case—as the facts upon which the draughtsman had to proceed were defective, and, therefore, cannot be now remedied.

A doubt appeared to exist at one moment, both in my noble and learned friend's mind and my own, whether we ought not to dismiss this bill, without prejudice, so as to enable the party to file another; but I think the real answer to that is, that, looking at the proceedings of 1713, that the lease was in existence, and was before the draughtsman who prepared that bill, which was disposed of by Lord Middleton, there is no evidence here, from the frame of that bill, of what the contents of the lease then before the draughtsman were. I do not say whether that bill would be evidence

between the same parties in the present suit, supposing an action was sent to be tried at law; I do not argue that at all; but, in the discretion which the Court has to exercise as to whether it will encourage another suit or not, it is very material to consider whether there is any possibility, when you look at the bill, of the lease being now produced containing the clause it is alleged to have contained, namely, the covenant for perpetual renewal. Is it possible to conceive that there should be a lease in existence with that covenant, when you see the way in which that bill is framed with the lease lying before the draughtsman at the time? So far from saying there is a covenant for perpetual renewal in that bill, he says there were various covenants in the bill; that it was agreed between the parties at and before the time of executing that lease,—it was understood and agreed between them that there should be a perpetual renewal, as more plainly appears by this clause, namely, the sixteen guinea clause. Now, if there had been a covenant for perpetual renewal, it would not have more plainly appeared by the sixteen guinea clause, but it would have most plainly appeared by that covenant of renewal itself. It is clear that there was no such covenant, or he would not have had recourse to that form of stating his case, or to that kind of evidence by which he was to support it. Then he states the reason why that sixteen guinea clause was so framed, and was not a covenant for perpetual renewal, namely, the unskilfulness of the conveyancer who prepared the lease. It is clear, in my opinion, that your Lordships have the strongest reason to suppose, — the strongest reason that can be imagined, — that in the

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lease itself, if it had not been unfortunately destroyed, there would have been found no covenant for a perpetual renewal, excepting that clause respecting the sixteen guineas.

I entirely agree with my noble and learned friend that this decree ought to be reversed, and the original bill dismissed, with costs, below.

It is ordered, that the said order complained of in the said appeal be reversed, and that the respondents bill be dismissed out of the Court below, with costs.

[2d, 4th, and 15th June 1840.]

(From the Court of Chancery, Ireland.)

MASON GERARD Earl of ALDBOROUGH, Appellant.

HENRY NORWOOD TRYE, THOMAS HENNEY, and
WILLIAM CHARLES KING, Executors of JOHN
HARVEY OLLNEY, deceased, Respondents.

Lord Aldborough, being tenant in tail male of certain estates expectant upon the determination of his father's life estate, charge his estates with the payment of 12,000*l.* and 20,000*l.* in case he shall survive his father, as the consideration to Colonel Ollney for his advancement to Lord Aldborough of 6,000*l.* and 10,000*l.*, and gives an annuity to his agent for his services, which is afterwards assigned by the agent to Colonel Ollney for a valuable consideration. Upon a bill brought by Colonel Ollney to enforce, and a cross bill by Lord Aldborough to set aside, these transactions:—Held, (though at the hearing of the cause evidence was given on the part of Lord Aldborough, that, according to the tables, an inadequate price was given for the post-obit securities, but no evidence of value was given by Colonel Ollney,) that the Court below, in directing the master to inquire what was the fair market price for the sums secured to be paid, having regard to the ages of Lord Aldborough and his father, the circumstances of the property, and the estate and interest of Lord Aldborough therein, and the other

circumstances in the pleadings mentioned, was a proper inquiry; and that the market value, not the value of the tables, was the proper criterion of value; and it was held that Colonel Ollney had a right to be repaid, with interest, the sum he had paid for the purchase of the annuity, though the annuity was voluntary, and not supported by a pecuniary consideration.

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IN and prior to the year 1825 Benjamin O'Neale Earl of Aldborough was tenant for life of certain estates in Ireland of the annual value of 8,000*l.*, with remainder to the appellant Mason Gerard Earl of Aldborough in tail male.

In 1825 Benjamin O'Neale Earl of Aldborough was upwards of seventy-nine years of age; the appellant was baptized on the 22d July 1784, and was in December 1825 under the age of forty-two years.

The appellant, Lord Aldborough, from the year 1817 until the year 1826 had been confined within the rules of the King's Bench prison for debt, and had been from 1817 until the death of his father in very embarrassed circumstances.

In the years 1810 and 1812 he alienated an annuity of 500*l.* granted to him by his father, the only income he had for the support of himself and his family, which in 1825 consisted of two sons and two daughters; and in and prior to the year 1825 judgments had been obtained against him to the amount of 160,000*l.*

Under these circumstances in the month of December 1825 it was agreed between William Read King, as the solicitor of John Harvey Ollney, and Lucius Hook Robinson, as the agent of the appellant, with whom the application for a loan had originated, that 6,000*l.* should be advanced to the appellant by John Harvey Ollney, in

consideration of his being paid 12,000*l.* three months after the death of the appellant's father, and of its being secured on the estates in Ireland.

An indenture, dated the 21st December 1825, was accordingly made and executed between the appellant, Lord Aldborough, of the one part, and John Harvey Ollney of the other part, whereby, in consideration of the sum of 6,000*l.* to the appellant paid by the said J. H. Ollney, the appellant covenanted that, in case he should survive his father, he would, in three months after his death, pay unto J. H. Ollney the sum of 12,000*l.*; and he thereby demised his estates in Ireland, of which he was seised or entitled at law or in equity, in possession, reversion, or remainder, unto the said J. H. Ollney, his executors, administrators, and assigns, from the day next before the day of the date of the said indenture, for the term of ninety-nine years, in trust, during so much of the said term as the said Benjamin O'Neale then Earl of Aldborough should live, for the said Benjamin O'Neale then Earl of Aldborough, and his assigns, and after his decease in trust for the person or persons for the time being entitled to the said hereditaments in remainder expectant on the determination of the said term, in case the said appellant, then Viscount Amiens, should depart this life in the lifetime of the said Benjamin O'Neale then Earl of Aldborough; or if the said appellant, then Viscount Amiens, should survive the said Benjamin O'Neale late Earl of Aldborough, then until default should be made in payment of the said sum of 12,000*l.*, or any part thereof, at the day or time appointed for payment thereof, in and by the covenant therein-before for that purpose contained; and upon further trust, that in case

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of the appellant, with warrants of attorney for entering up judgment against him.

On the 28th July 1827 the sum of 10,000*l.* was paid by William Read King to the appellant in the following manner:—6,000*l.* in Bank of England notes, and 4,000*l.* in eight bills of exchange of 500*l.* each, payable at six months after date, and 100*l.* for discount. The bills, when they became due, were paid to the appellant.

On the 28th December 1825 W. R. King, who prepared the deeds, received from Lucius Hook Robinson, for his expenses attending the loan of 6,000*l.*, and for preparing, engrossing, and executing the indenture and bonds for the same, the sum of 285*l.* in part payment of 300*l.*, which L. H. Robinson had previously agreed to pay him for such expenses, and on the 28th of July 1827 a sum of 500*l.* for similar expenses in respect of the loan of 10,000*l.*, which L. H. Robinson had previously agreed to pay him. In neither case was any bill of costs made out by William Read King.

By indenture of the 28th July 1827, executed between the appellant of one part and L. H. Robinson of the other part, in consideration of the services performed by L. H. Robinson for the appellant, and for a nominal consideration, the appellant granted to L. H. Robinson an annuity of 200*l.*, issuable out of and charged upon the same estates, to hold the said annuity unto the said L. H. Robinson, his executors, administrators, and assigns, for the term of 99 years, to commence and be computed from the death of Benjamin O'Neale late Earl of Aldborough, if the appellant should be then living, and fully to be complete and ended if the said L. H. Robinson should so long live; and to be paid quarterly, the first payment to be made at the expiration of three calendar months

after the decease of the said Benjamin O'Neale late Earl of Aldborough, if the appellant should survive him ; and in case of the death of the said L. H. Robinson on any other day of the year than one of the said quarterly days of payment, then also a proportionate part of the said annuity for the time which at the death of the said L. H. Robinson should have elapsed since either the day of the decease of the said Benjamin O'Neale late Earl of Aldborough, in case the said appellant should have survived him, or the then last quarterly day of payment, as the case might be ; and by the said indenture the said appellant demised unto the said L. H. Robinson, his executors, administrators, and assigns, the hereditaments in Ireland for the term of 100 years, without impeachment of waste, upon certain trusts for securing the said annuity thereby granted.

By indentures of lease and release, bearing date respectively the 2d and 3d days of July 1828, the release being made between the said Benjamin O'Neale Earl of Aldborough of the first part, the appellant of the second part, Charles Doyne of the third part, William Jackson of the fourth part, James Montgomery Blair of the fifth part, Robert Saunders and the reverend John Charles Lloyd of the sixth part, and the said Charles Doyne and Thomas Rickards Watkins of the seventh part, and by certain common recoveries suffered in the Court of Common Pleas in Ireland, the hereditaments and premises comprised in the several indentures before mentioned were discharged from the estate tail of the appellant, and were settled to the use that the said James Montgomery Blair, his executors and administrators, might, during the joint lives of the said Benjamin O'Neale Earl of Aldborough and the

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appellant, receive, upon certain trusts, a yearly rent-charge of 700*l.* to be issuing out of the said hereditaments; and subject thereto, to the use of the said Charles Doyne and Thomas Rickards Watkins, their executors, administrators, and assigns, for a term of years for securing the same; and subject thereto, to the use that after the decease of the said Benjamin O'Neale Earl of Aldborough the said Robert Saunders and John Charles Lloyd, their executors, administrators, and assigns, should receive upon certain trusts a rent-charge of 700*l.*, to be issuing out of the said hereditaments; and subject thereto, to such uses as the said Benjamin O'Neale late Earl of Aldborough and the said appellant should jointly appoint; and in default of such appointment, to the use of the said Benjamin O'Neale Earl of Aldborough and his assigns for his life, without impeachment of waste; and after his decease, to the use of the appellant, his heirs and assigns for ever.

In and about the month of March 1833 L. H. Robinson applied, on behalf of the appellant, to William Read King, as the solicitor of J. H. Ollney, for a further loan of 5,000*l.*

By indentures of lease and release bearing date respectively the 1st and 2d days of March 1833, the release being made between the appellant of the first part, the said J. H. Ollney of the second part, and Margaret Powell and the respondent William Charles King of the third part, in consideration of the sum of 5,000*l.*, the appellant covenanted with the said J. H. Ollney, his executors, administrators, and assigns, that he the appellant, his heirs, executors, or administrators, would, on the 2d day of August then next ensuing, pay unto the said J. H. Ollney, his executors, administrators,

or assigns, the sum of 5,000*l.* of lawful money of Great Britain, together with interest after the rate of 6 per cent. per annum, to be computed from the day of the date of the said indenture, without any deduction whatsoever; and by the said indentures, for the considerations aforesaid, the appellant conveyed unto the said Margaret Powell and William Charles King, and their heirs, all the hereditaments comprised in the indentures before mentioned, to the use of the said Margaret Powell and William Charles King, their heirs and assigns for ever, subject nevertheless to the life estate of the said Benjamin O'Neale Earl of Aldborough, and to the said indentures of the 21st day of December 1825 and the 27th day of July 1827 respectively, and to the annuity of 700*l.*, limited to the said Robert Saunders and John Charles Lloyd as aforesaid by the said indenture of the 3d day of July 1828, nevertheless upon the trusts following; that is to say, in case the said two several sums of 12,000*l.* and 20,000*l.*, secured by the said herein-before stated indentures of the 21st day of December 1825 and the 27th day of July 1827 respectively, should either never become payable, or should, together with all interest thereon respectively, have been fully paid and satisfied to the said J. H. Ollney, his executors, administrators, or assigns, at the expiration of six calendar months next after the decease of the said Benjamin O'Neale Earl of Aldborough, and in case the said sum of 5,000*l.* and all interest thereon should have been fully paid and satisfied within six calendar months next after the decease of the said Benjamin O'Neale Earl of Aldborough, then in trust for the appellant, his heirs and assigns for ever; but in

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case such several sums of 12,000*l.* and 20,000*l.*, or any part thereof or any interest thereon, should not have been paid within six calendar months next after the decease of the said Benjamin O'Neale Earl of Aldborough, then upon trust to sell and dispose of the said hereditaments or any of them, or any part thereof, and out of the monies to arise from such sale or sales, and out of the rents and profits which should arise from the said hereditaments from and after the death of the said Benjamin O'Neale Earl of Aldborough, in the first place pay and satisfy all the costs, charges, and expenses attending or in anywise relating to the said sale or sales, and in the next place pay and satisfy unto the said J. H. Ollney, his executors, administrators, and assigns, all principal monies and interest which should be due in respect of the indentures of the 21st of December 1825 and 27th of July 1827, and of the present indenture; and should pay the ultimate surplus, which should remain after answering all the purposes aforesaid, unto the appellant, his heirs or assigns, for his or their own absolute use and benefit.

On the 2d of March 1838, 4,700*l.*, part of the said sum of 5,000*l.*, was paid to the appellant in Bank of England notes, and 300*l.*, the residue, was retained for the expenses of William Read King in effecting the loan.

By an indenture bearing date the 4th day of March 1838, and made between the said L. H. Robinson of the one part and the said J. H. Ollney of the other part, in consideration of the sum of 750*l.* paid to the said L. H. Robinson, the said L. H. Robinson assigned to the said J. H. Ollney, his executors, administrators,

and assigns, the said annuity of 200*l.* granted by the said indenture of the 28th July 1827, and the lands thereby demised.

Benjamin O'Neale Earl of Aldborough died on the 9th July 1833, and was succeeded in the earldom by the appellant.

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On the 28th day of November 1833 J. H. Ollney filed his bill in the Court of Chancery in Ireland against the appellant and others, stating the several deeds before mentioned, and praying that an account might be taken of what was due to the said J. H. Ollney for principal and interest in respect of the said three several sums of 12,000*l.*, 20,000*l.*, and 5,000*l.*, and in respect of the said annuity of 200*l.* so assigned to the said J. H. Ollney as aforesaid, and of all incumbrances affecting the said lands and premises or any of them prior to the demands of the said J. H. Ollney; and that, in default of payment of the sums which should be found due on such account, the appellant might be debarred and foreclosed from all equity of redemption in the said hereditaments respectively charged with the said principal sums and interest; and that the same might be sold; and that out of the proceeds of such sale or sales the sum which should be found due to the said J. H. Ollney upon taking such account, and such other charges as the Court should consider to be properly payable thereout, might be paid and satisfied; and that the residue of such proceeds, or a competent part thereof, might be properly secured for the purpose of answering the accruing payments of the said annuity; and that in the meantime a receiver might be appointed of the said lands and hereditaments, and might be directed to apply the rents towards satis-

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faction of the sums due or to become due to the said J. H. Ollney.

The appellant, by his answer to the bill, stated, amongst other things, that in the respective years 1810, 1812, 1814, and 1816 he charged his estates in Ireland with annuities amounting to 1,324*l.* or thereabouts, payable during the lives of himself and of other persons in the event of his surviving his father, and with divers principal sums of money amounting to upwards of 40,000*l.*, payable in the like event; and he alleged, that at the time when the said J. H. Ollney paid him the said sums of 6,000*l.* and 10,000*l.* he was in great pecuniary distress, and was thereby induced to submit to unreasonable terms; and that the said L. H. Robinson was employed by the said J. H. Ollney, and not by the appellant, in negotiating the said transactions; and that the said indenture of the 21st of December 1825 was prepared by Mr. William Read King, the solicitor of the said J. H. Ollney, and was executed by the said appellant in prison, and without employing or consulting any solicitor; and that the said indenture was not in conformity to the agreement between the parties, for that the appellant had agreed to pay the said sum of 12,000*l.* within twelve, and not within three, months after the death of his father if he survived him; and that the appellant, on the execution of the said indenture, paid to the said L. H. Robinson 600*l.* as a bonus with the knowledge of the said J. H. Ollney; and that the said indenture of the 27th day of July 1827 was also prepared by the said W. R. King, and was executed by the appellant while abroad, and without consulting any solicitor; and that on the execution of the said last-mentioned indenture the appellant paid to the said

L. H. Robinson 1,000*l.* as a bonus, and also paid to the said W. R. King 500*l.* for his charges, exclusive of stamps and other costs out of pocket, and travelling expenses; and that the said indenture of the 28th day of July 1827 was prepared by the said W. R. King with the privity of the said J. H. Ollney; and that by another deed the appellant appointed the said L. H. Robinson receiver of the rents of the said hereditaments after the death of the appellant's said father; and that in the year 1825 the appellant's father was upwards of eighty-three years of age, and was in a very infirm state of health, and that the appellant was then only forty-five years of age, and a very healthy person; and the appellant by his answer insisted that on payment of the said sums of 6,000*l.* and 10,000*l.*, with interest from the times of the said advances, the said indentures of the 21st of December 1825 and the 27th July 1827 ought to be set aside, and that this indenture of the 28th July 1827 ought to be set aside, without payment by the appellant of any sum whatsoever. And the appellant alleged, that out of the said sum of 5,000*l.* he paid to the said W. R. King 300*l.* or thereabouts for the expenses of the said loan; however, he admitted that the said J. H. Ollney was entitled to the said sum of 5,000*l.* secured by the said indentures of the 1st and 2d March 1833, with interest thereon from the time of the advance thereof; and the said appellant submitted, that at the time of the said several transactions with the said J. H. Ollney the appellant was in the situation of an expectant heir, dealing with his expectancies, and that advantage had been taken by the said J. H. Ollney and his agent of the situation of appellant, and of his necessities and embarrassments; and that appellant

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was entitled in equity to be relieved from the said bargain.

On or about the 19th February 1835 the appellant filed a cross bill in the said Court of Chancery in Ireland against the said J. H. Ollney, Margaret Powell, and W. C. King; and by such cross bill stated the original bill of the said John Harvey Ollney, and stated and charged the matters contained in his answer to the original bill, and charged that L. H. Robinson was the agent of J. H. Ollney.

And that the appellant executed the said indenture of the 28th day of July 1827 without receiving any consideration for the same, and that same was in fact only colorably granted to the said L. H. Robinson, he being in fact a mere trustee for the said J. H. Ollney, and it not being meant or intended that he should derive or receive any benefit or advantage from the same; and that no money consideration was in fact paid by the said J. H. Ollney to the said L. H. Robinson for the assignment of the said annuity; and that if any such was paid it was only colorably done, and that such consideration had been repaid to the said J. H. Ollney, or been allowed to him by the said L. H. Robinson in some collusive manner, for the purpose of enabling the said J. H. Ollney to insist that he was a purchaser of the said annuity from the said L. H. Robinson.

And appellant by his said cross bill charged that appellant, some time in the year 1828, joined with his father in suffering recoveries of all the said estates tail, which were re-settled to the use of appellant's said father for life, with an absolute vested remainder in fee to appellant, expectant on the decease of appellant's said father, who was then at the point of death; which

having come to the knowledge of the said J. H. Ollney or his agents, he, in order, if possible, to give validity to the said loans, proposed to lend appellant the sum of 5,000*l.* upon the terms of appellant securing the said principal sum and interest from the time of the said advances by a conveyance of all his said estate to trustees as therein-after mentioned; and appellant having agreed thereto, and being much in want of money, and pressing for the said advance, the said J. H. Ollney, or his agents, represented to appellant that it would be convenient for him to have all his demands included in one deed, and that appellant could not be in any way prejudiced by doing so; whereupon appellant, who had no professional man concerned for him on the said negotiation, and finding that the said J. H. Ollney would not lend the said 5,000*l.* unless he submitted to the said request, consented that the deed about to be executed should also include the said two sums of 12,000*l.* and 20,000*l.* in addition to the said sum of 5,000*l.*; and appellant, then being under the pressure of absolute want, did thereupon execute the said indenture of the 2d of March 1833; and that the said deed was prepared by the said W. R. King, who, with the knowledge and consent of the said J. H. Ollney, retained or was paid the sum of 300*l.* for preparing the same out of the said sum of 5,000*l.*; and that appellant executed the said deed without ever having read over the same or any copy thereof, and in the kingdom of France, where appellant then resided, and from whence he could not depart, he being at the time indebted to several inhabitants of that country.

And the said appellant by his said cross bill prayed that the said indentures of the 21st day of December

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1825, the 27th day of July 1827, the 28th day of July 1827, and the said bonds dated the 21st day of December 1825 and the 27th day of July 1827 might be set aside as fraudulent and void, and be delivered up to be cancelled upon payment by appellant of the principal sum actually and bonâ fide paid to appellant on the execution of the said deeds, after deducting throughout all such sums as appellant by fraud or imposition was compelled to repay or allow the said L. H. Robinson and W. R. King at the desire and by the contrivance of the said J. H. Ollney; which principal sums, with the interest thereon from the time they were respectively advanced, appellant undertook to pay when fully ascertained; and that the said deed of annuity of the 28th of July 1827 might be set aside and delivered up to be cancelled, and that an account might be taken of the sum due for principal and interest on foot of the sums actually and bonâ fide received by appellant for his own use at the times of the said respective alleged advances, and also an account of the sum of 5,000*l.* so advanced to appellant on the 2d day of March 1833, with interest for the advance; and that the several deeds and securities so obtained by the said J. H. Ollney, if not altogether set aside, might be deemed to be securities only for the sum or sums of money which, upon the taking of the said account, should appear to be due on foot of the said respective advances made to appellant by the said J. H. Ollney; and that upon payment of such sums as should be found due on taking the said account, which appellant undertook to make, the said lands and hereditaments might be re-conveyed to appellant.

J. H. Ollney by his answer denied that L. H. Robinson was his agent, or that he had any knowledge of the

bonuses, or the sums paid or retained by William Read King for costs; and he further stated that he paid the sum of 750*L*. to L. H. Robinson as the consideration for the assignment of the annuity of 200*L*., and that no part thereof had ever been returned to him.

On the 16th January 1836 J. H. Ollney died, and the suits were revived against the respondents and his executors.

The said suits being at issue, witnesses were examined on both sides in each suit.

The respondents in the suits instituted against the appellant proved the execution of the several deeds and the payment of the consideration for them in the manner before mentioned, and that Lucius H. Robinson was the agent of the appellant. W. R. King proved the due execution by the appellant of the deeds and the consideration for the several deeds as before mentioned.

The appellant proved that the chief clerk to the Pelican Life Insurance Office, who had been accustomed to the calculating the value of contingent reversionary interests for twenty years, calculated that the sum of 8,576*L*. 4*s*. 5*d*. was a fair and proper sum, in the month of December 1825, in respect of the sum of 6,000*L*. then paid, to be secured and payable and paid within three months after the death of a gentleman of seventy-nine years in the event of his being survived by a gentleman then forty-two years of age; and that the sum of 13,838*L*. 15*s*. 8*d*. was a fair and proper sum, in the month of July 1827, in respect of the sum of 10,000*L*. then paid, to be secured and payable and paid three months after the death of a gentleman then aged forty-four years; and he calculated the same by the Carlisle table of mortality, and reckoning the interest of money at five per cent.; but no

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evidence was given on the part of the respondents to show what was the value of the post-obit bonds at the time they were purchased.

On the 7th of February 1837 the causes came on to be heard before the Lord Chancellor of Ireland, when he decreed that it should be referred to the master to inquire, and report whether, under all the circumstances, the sum of 6,000*l.* paid by the said J. H. Ollney to the now Earl of Aldborough on the 21st day of December 1825 was a fair market price for the sum of 12,000*l.*, secured to be paid to the said J. H. Ollney by Mason Gerard Earl of Aldborough at the time and in the manner in the pleadings mentioned, taking into consideration the relative ages at the time of the said Earl of Aldborough and his father, Benjamin O'Neale Stratford then Earl of Aldborough, and the circumstances of the property whereon the said sum of 12,000*l.* was intended to be secured, and the estate and interest of the said defendant, the Earl of Aldborough, therein, and the other circumstances in the pleadings mentioned relative to the said transaction; and his Lordship further ordered, that it should be referred to the said master also to inquire, and report whether, under all the circumstances, the sum of 10,000*l.*, paid by the said J. H. Ollney to the said Earl of Aldborough on the 27th day of July 1827, was a fair market price for the sum of 20,000*l.*, secured to be paid to the said J. H. Ollney by the said Mason Gerard now Earl of Aldborough at the time and in the manner in the pleadings mentioned, taking into consideration the relative ages at the time of the said Earl of Aldborough and his father, Benjamin O'Neale Stratford then Earl of Aldborough, and the circumstances of the property whereon the sum of

20,000*l.* was intended to be secured, and the estate and interest of the said defendant, the Earl of Aldborough, therein, and the other circumstances in the pleadings mentioned relative to the said transaction; and his Lordship further ordered, that the defendant, the Rev. John Christopher Lloyd, should have his costs against the plaintiffs, H. N. Trye, Thomas Henney, and William Charles King; and his Lordship reserved the question, whether the said plaintiffs should have the same over against Lord Aldborough, and all further directions, until the return of the master's report, whereon such further order should be made as should be fit.

The respondents under this decree gave in evidence before the master, that the price given by J. H. Ollney to the appellant was the fair market value of the post-obit bonds. The appellant gave no evidence before the master as to their value, except what he had given upon the hearing of the cause.

On the 20th March 1838 the master made his report, and found, that under all the circumstances the sum of 6,000*l.*, paid by the said J. H. Ollney to the said appellant on the 21st of December 1825, was a fair market price for the sum of 12,000*l.* secured to be paid to the said J. H. Ollney by the said appellant at the time and in the manner in the pleadings mentioned; and that the sum of 10,000*l.*, paid by the said J. H. Ollney to the appellant on the 27th day of July 1827, was a fair market price for the sum of 20,000*l.* secured to be paid to him by the said J. H. Ollney at the time and in the manner in the pleadings mentioned.

The said appellant caused objections to be taken to the draft of the said master's report, which the master

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overruled, and the said appellant did not file any exceptions to the said report.

The said causes came on for hearing before the Lord Chancellor of Ireland on report and merits, and for further directions, on the 26th and 27th days of April 1838, when it was decreed that the said report should stand confirmed; and that the said two sums of 12,000*l.* and 20,000*l.*, secured by the deeds dated respectively the 21st day of December 1825 and the 27th day of July 1827, and interest thereon respectively at the rate of 5*l.* per cent. per annum from the 10th day of October 1833 until paid, were charges on the lands and premises in the pleadings mentioned: and it was further decreed that the said respondents were entitled thereto: and it was further decreed, that the said respondents were also entitled to the sum of 5,000*l.*, secured by the deed bearing date the 2d day of March 1833, in the pleadings also mentioned, with interest thereon at the rate of 6*l.* per cent. per annum, to be computed from the said 2d day of March 1833 until paid, and that the same was well charged on the said lands and premises: and it was further decreed, that the said respondents were not entitled to the annuity of 200*l.* a year in the pleadings mentioned, granted by the said deed of annuity bearing date the 28th day of July 1827, and assigned to the said J. H. Ollney, deceased, by deed bearing date the 4th day of March 1833; but that the said deeds were only to stand as security for the sum of 750*l.*, being the consideration money paid by the said J. H. Ollney to L. H. Robinson for the purchase of the said annuity, with interest thereon from the said 4th day of March 1833, at the rate of 5*l.* per cent.

per annum, until paid; and that the said sum of 750*l.* and interest were well charged on the said lands and premises in the pleadings mentioned, and in the same priority as the said annuity: and it was further decreed, that the respondents bill in the original cause should stand dismissed without costs, so far as the same sought to establish the same annuity of 200*l.* per annum: and it was further ordered that it should be and it was thereby referred to the master in the cause, to take an account of what was due to the plaintiffs in the first cause for principal and interest in respect of the aforesaid sums of 12,000*l.*, 20,000*l.*, 5,000*l.*, and 750*l.*, and also to take an account of all incumbrances prior to the said plaintiffs demands affecting the estate of the appellant in the pleadings mentioned: And it was further decreed, that the defendant, the Rev. John Christopher Lloyd, should be struck out of the bill in the first cause, and that the plaintiffs in the first cause should have, as part of their costs in the said first cause, the costs which, by the decretal order of the 7th day of February 1837, they were directed to pay to the said Rev. John Christopher Lloyd: and it was further decreed, that the said respondents should have the costs as plaintiffs in the said first cause, and as defendants in the said second cause, including the costs of the reference under the said decretal order of the 7th day of February 1837, as against the appellant and the lands and premises in the pleadings mentioned: and the consideration of all further directions was reserved.

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Appellant's
Argument.

Mr. Pemberton and Mr. Knight Bruce for the Appellant.

—The appellant was in great pecuniary difficulties, and confined in the King's Bench, when he was obliged to raise 6,000*l.* upon post-obit bonds. The 6,000*l.* was paid, 2,000*l.* in cash and 4,000*l.* in promissory notes, upon which no discount was allowed; 800*l.* was paid to Mr. King, but no bill of costs was made out. Lord Aldborough procured his discharge from prison by this advance. In respect of the loan of 10,000*l.*, 500*l.* was paid to Mr. Read King, the solicitor, for effecting the loan. The onus lay upon the purchaser to show that a proper value was given for the expectancies, *Davis v. Duke of Marlborough*¹, but no evidence was given by him as to the value. The cause was ripe for decision, and the Court ought to have made a decree at the hearing, and not have directed any inquiries. Our evidence shows an enormous disproportion between the sum given and what ought to have been given for the expectancies. In *Gowland v. De Faria*² a decree was made upon the calculated value, and not on the marketable value, of a reversion, and that judgment was approved of in *Lord Portmore v. Taylor*.³ The principle laid down in *Headen v. Rosher*⁴ by Sir William Alexander, that the calculated value is not the proper criterion of value, is improper. The form of the inquiries directing the other circumstances in the pleadings mentioned to be inquired into is wrong. What does it mean? The annuity granted by the appellant, having no consideration to support it, cannot stand; the Court below has not sustained it, L. H. Robinson could not have enforced it, and the assignee

¹ 2 Swanston, 139.

³ 4 Simons, 210.

² 17 Vesey, 20.

⁴ 1 M'Clel. and You. 89.

ought not to stand in a better situation than the original grantee.

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Respondents
Argument.

The Attorney General and Mr. Jacob for the Respondents.—The market value is the only proper criterion of value; market value in no instance reaches the value of the tables. Sir Anthony Hart, in *Scott v. Dunbar*¹, disapproved of *Gowland v. De Faria*. In *Headen v. Roshier* Sir William Alexander refused to set aside a sale, though the value was inconsistent with the tables. In *Potts v. Curtis*² the market value prevailed over the value estimated by the tables; so *Wardle v. Carter*³; and in *Headen v. Roshier* the Court refused to set aside a sale of a reversionary interest, though inconsistent with the values calculated by the tables. It is said the onus lies upon the purchaser of proving the value; he proved the whole consideration paid, and the evidence brought forward on the part of the appellant might prove there was no inadequacy; sale by auction admits the principle of market value, *Shelley v. Nash*⁴, except where the auction is colourable, *Fox v. Wright*.⁵ All the circumstances must be taken into consideration: that the appellant was tenant in tail in remainder; that there were incumbrances upon the estate; that, not having the legal estate or the deeds, the purchaser could not know the amount of the charges; if the appellant had refused to suffer a recovery, the estate could not have been liable; no circumstances were inquired into before the master, except what was the value to be got in the market. With regard to the

¹ Moll, 458.

² 1 Young, 543.

³ 7 Simons, 490.

⁴ 3 Madd, 232.

⁵ 6 Madd, 111.

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annuity, there seems no reason why it should have been set aside; it was good against the grantor; but at any rate it was good in the hands of a purchaser for a valuable consideration, *George v. Milbanke*.¹

Appellants
Argument.

Mr. Pemberton in reply.—This was a bill by a purchaser to enforce his demand; it was incumbent upon him to prove the value, *Kendall v. Beckett*², *Bawtree v. Watson*.³ The protection which the Court affords to expectant heirs is very different from a naked reversion. The appellant was in very distressed circumstances; 1,800*l.* life annuities and 40,000*l.* charged upon the estate. The consideration is not proved as stated; promissory notes and bills of exchange are very different from hard cash; many contingencies are not the subject of valuation, *Baker v. Bent*⁴, *Drought v. Eustace*.⁵ It may be said we had no right to take a chance of the inquiry; we had a right so to do; a purchaser has nothing to do but file his bill, go into no evidence, and then have an inquiry in the master's office.

LORD CHANCELLOR.—I must have copies of the bill; there are no copies in the printed cases.

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LORD CHANCELLOR.—In this case I was desirous, before I stated any opinion I had formed on the argument, to have an opportunity of looking into the pleadings, particularly with respect to the annuity of 800*l.* a year.

¹ 9 Vesey, 190.

² 3 Mylne and Keen, 339

³ 1 Molloy, 328.

⁴ 2 Russell and Mylne, 88.

Russell and Mylne, 224.

The cause came on on a bill and cross bill, the object of the cross bill being to set aside certain post-obit securities given by the present Lord Aldborough during the lifetime of his father. When the cause came on before the Lord Chancellor of Ireland, a reference was made to the master to inquire "Whether, under all the circumstances, the sum of 6,000*l.* paid by Ollney to the now Earl of Aldborough was a fair market price for the sum of 12,000*l.* secured to Ollney at the time and in the manner in the pleadings mentioned, taking into consideration the relative ages at the time of the said Earl of Aldborough and his father Benjamin O'Neale Stratford then Earl of Aldborough, and the circumstances of the property whereon the said sum of 12,000*l.* was intended to be secured, and the estate and interest of the defendant the Earl of Aldborough therein, and the other circumstances in the pleadings mentioned relative to the said transaction."

Upon this reference, made on the 7th day of February 1837, the master made his report, by which he found that, under all the circumstances, the sum of 6,000*l.* paid by Ollney on the 21st of December 1825 was a fair market price for the sum of 12,000*l.* secured to be paid to Ollney at the time and in the manner in the pleadings mentioned. There was a similar finding with respect to the sum of 10,000*l.*

To this report no exceptions were taken. It was at one time supposed, that there was some informality in the manner in which the report was confirmed; that supposition was removed, and there appears now to be no irregularity in the mode in which that report was dealt with upon the decree for further directions.

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The case, therefore, stands upon the report not complained of, establishing the fact that with regard to those two sums, the sum paid was, under all the circumstances of the case, a fair price for the sum received by Lord Aldborough in his then situation of expectant heir.

Two grounds of objection have been taken to the course adopted by the Court of Chancery in Ireland. The first is, that that finding did not justify the decree upon further directions, by which that security was enforced against the estates charged with it; the other is, that, however that might be, yet that upon the original decree, inasmuch as it was not then proved that that was a fair price, it was the duty of the Court to have granted the relief prayed by the cross bill.

The second ground I propose to dispose of and to state my opinion upon first,—and I think this House will not be disposed to give much weight to that objection. The party takes the inquiry, and does not complain of the decree directing the inquiry until after the result of that inquiry is ascertained to be against him. Although, undoubtedly, it is competent to him to complain of the original decree, it is not a complaint to which this House will be very ready to listen. If he can show that there was any error in that decree, he is not precluded from stating his complaint; but in a matter which is purely matter of discretion, where the Court thinks it has not sufficient information to enable it to administer justice between the parties, and either directs an issue or directs an inquiry for the purpose of better ascertaining the facts,—when your Lordships find, upon that inquiry and that investigation, that the facts

lead to a conclusion against the plaintiff, this House will not be much disposed to set aside the whole proceeding, because the Court exercised the discretion of directing that inquiry in order to ascertain those facts.

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I conceive it to be quite competent to the Court, and that the Court exercised a very sound discretion in directing that inquiry. It appears to be established by several cases that where a party deals with an expectant heir, the onus is upon him to show that he gave a fair price for that which he purchased. It does not from that proposition follow that he is bound to establish it in a different way from that in which it is competent to any other suitor to establish any fact or facts upon which his cause rests ; and if, when the cause comes to a hearing, the Court finds that it requires further inquiry to ascertain the facts necessary for the due decision of the case, that is a matter so entirely in the discretion of the Court, that a complaint resting upon that ground is not one to which this house would very readily yield.

Now, in this case, I think I shall in a few words satisfy your Lordships that there was no evidence to enable the Court satisfactorily to dispose of the question between the parties ; the Court, therefore, directed an inquiry, and the result of that inquiry is what I have stated. That, however, leaves entirely open the question whether the result of the inquiry found by the master entitled the party claiming the benefit of the security to the benefit of a decree to enforce it, or whether it would merely have entitled the party seeking to have that transaction set aside, to have a decree for that purpose.

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In order to support the proposition set up on the part of Lord Aldborough, who complains of these securities, and seeks to have them set aside, it was argued that in the case of *Gowland v. De Faria* this proposition had been established. There are two propositions: one which was established, and the other supposed to be established in that case; the one said to be established was, that in a transaction with an expectant heir it was necessary for the party seeking the benefit of that transaction to show that he gave a fair price; but that proposition has been the subject of much observation, undoubtedly, since that decision took place, and it has been considered as interfering a good deal with that proper discretion which persons who are capable, according to the law of this country, of disposing of their own property, ought to be at liberty to exercise. At the same time it does establish a rule which has the effect of protecting persons who are, generally speaking, very much in need of protection. Of the policy of that rule it is not my purpose to say any thing; that rule has been established in the case of *Gowland v. De Faria*, and has been recognized since.

But another proposition has been supposed to be established by the case of *Gowland v. De Faria*, which is, that in transactions of this sort the Court has only to look at the value of the reversionary interest calculated according to the tables; that is to say, how much of the value of the property is to be deducted on account of its being a postponed interest, postponed by the chance of the duration of another life, and that that is capable of being reduced by calculation to what is considered a fair induction with reference to the duration of the life on which it is dependent.

I do not find any such proposition established by Sir William Grant in that case. Sir William Alexander, in the case before him of *Headen v. Rosher*, in 1st M'Clelland and Young, 89, and Lord Lyndhurst again, in the case of *Potts v. Curtis* in 1st Young, 543, entertained the same opinion; and upon looking at the language of Sir William Grant it does appear to me that that rule is not at all to be extracted from it. In that case there was no evidence but that of the actuaries, and the evidence of the actuaries proved that the sum given was not the marketable value of the reversion. Sir William Grant, in observing upon the case, states the evidence before him, namely, that of the actuaries, and says there is no other evidence in the case, and he then proceeds upon that evidence, there being no other. Now, the only observation I will make upon that case is, that one may suppose it would have been a more wholesome course to have adopted, seeing that the evidence was only the evidence of the actuaries, and the Court being of opinion that that was not evidence which ought to be conclusive in a case of that description between the parties; I say it would seem to have been better to have adopted some course for the purpose of ascertaining more correctly the value, in the sense in which that term is to be used in inquiries of that kind. Sir William Grant, however, did not adopt that course, and he decided it upon the only evidence he had, that only evidence being to the effect that an inadequate consideration had been given. It is, therefore, not an expression of opinion by Sir William Grant, that that is a rule that ought to be adopted; it is only a dealing with that case, with reference to its own particular circumstances.

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That has been disapproved of by subsequent decisions of the highest authority. It was disapproved of by Sir William Alexander, in a judgment the reasons of which are very conclusive to show the soundness of the conclusion at which he arrived. It was also objected to and disapproved of by Lord Lyndhurst, in the case to which I have referred; and if your Lordships consider what the effect of that rule would be,—how inapplicable it is to the great mass of cases,—how little calculated it is to lead to a right conclusion, and how much it must interfere with the right of disposing of property, I am sure this House will not hesitate in preferring the rule which has been established in subsequent cases to that which has been supposed to have been established in the case of *Gowland v. De Faria*.

It is sufficient to say, that the establishment of that rule would make it impossible for an expectant heir to dispose of his interest at all; that, I apprehend, is quite a sufficient objection. It is a rule also, which, as a general rule, being calculated on the result of a great mass of cases, must apply with great injustice in a great variety of individual cases. The lives are supposed to be of average value; but the life in question may be an extraordinarily good or an extraordinarily bad life,—one which is likely to last beyond the usual time, or the contrary; how then can it be right to establish a rule not applicable to the particular case, but applying to a mass of cases collected together, and to make that rule govern an individual case to which it may not at all apply?

I will not go further into my reasons for not adhering to that supposed rule. The matter having been very fully and very ably discussed by Sir William Alexander and

by Lord Lyndhurst, it appears unnecessary further to discuss it here than to say, that I entirely concur in the reasons of those two very learned judges, and I do not think that the rule supposed to be extracted from *Gowland v. De Faria* is a rule which ought to be laid down.

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Then, if that be so, in what position does the present case stand? Taking the report as establishing the fact, it is a bill to set aside these transactions, it being established as a fact that the transactions are fair and proper transactions, regard being had to all the circumstances of the case. I will only observe, that the cases of *Shelly v. Nash*, in 3d Maddox, 232, and the case of *Baker v. Bent*, in 1st Russell and Mylne, 224, although they are not expressly to the same point, yet they establish this proposition; namely, that the market price is the thing to be looked at; for if the market price is not the thing to be looked at, how is it established that a sale by auction is within the rule? A sale by auction is a means of ascertaining the market price; it is a means of ascertaining, as nearly as it can be ascertained, that that sum which it will fetch in the market is the sum which the thing is worth, and therefore negatives the imputation of fraud.

The case, therefore, stands upon the fact being established, that the sum given was the fair market price. Now, taking that as a fact which is established, and which therefore constitutes a proposition fixed between the parties, that the party buying gave the fair market price under all the circumstances,—that that is the proposition your Lordships have to decide, and which the Court of Chancery in Ireland had to decide,—

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it is impossible that the case on the part of the appellant can be maintained for a moment, unless the doctrine be established which is supposed to be extracted from *Gowland v. De Faria*. This transaction now cannot be any further questioned. It appears to me to be established that the fair market price was given for these bonds under all the circumstances of the case, regard being had to all the facts which are referred to in the pleadings; all of which were material in order to fix the price that was fair and proper for Mr. Ollney to give to Lord Aldborough under the circumstances. I apprehend, therefore, that, as soon as it is established that the doctrine supposed to be extracted from *Gowland v. De Faria* is not the doctrine of a court of equity, and as soon as it appears that the parties are precluded from disputing the finding of the master, the question is in substance disposed of, as far as relates to these two sums of 6,000*l.* and 12,000*l.*

One other part of the case only remains, and that is a point upon which I was desirous of investigating the pleadings, which unfortunately, upon that which is the only part of the case involving any difficulty, are not printed in the papers. There was an annuity given, and a deed, not of the same date, but alleged to have been part of the same transaction, but on the day after the grant of one of these securities;—it is an annuity given to Mr. Robinson, and at a subsequent period, that is to say, in the year 1833 (the grant of the annuity being in 1828) Mr. Ollney, the grantee of the other securities, is alleged to have purchased from Mr. Robinson this annuity for 750*l.* The case made by the bill is, that it was a mere fiction, in order to give an

appearance of validity to the transaction which did not in fact belong to it; that Mr. Robinson was only a trustee or agent for Mr. Ollney; that it was intended as an additional benefit to Mr. Ollney. The bill stated that Mr. Robinson was in substance the agent and attorney for Mr. Ollney, not for Lord Aldborough, and that his name was used for the purpose of securing this benefit to Mr. Ollney; that the 750*l.* either was not paid at all or merely colourably paid.

That case has entirely failed. It is established that Mr. Robinson was the attorney for Lord Aldborough, and it is established that the annuity was granted for Mr. Robinson's benefit in the first instance, and that Mr. Ollney paid 750*l.* to Mr. Robinson. Now the bill does not impeach the transaction as a transaction in which an attorney has secured improperly a benefit to himself from his client; it does not attack it upon that ground at all. The grounds upon which it is impeached, and upon which it is sought to take the benefit of that purchase from Mr. Ollney, have entirely failed. I may assume that this is not affected at all with fraud, but that it was a voluntary annuity, because that is admitted by the other party; that is to say, voluntary, so far that there was no money consideration paid for it. Whether it was earned by any services, we do not know; but we know that it was not the subject of a money transaction nor of purchase between Mr. Robinson and Lord Aldborough. That was a transaction in 1828. Five years afterwards, in 1833, (nothing in the meantime being done for the purpose of questioning the security, it being a security under the hand of Lord Aldborough,) Mr. Ollney purchased it, and paid 750*l.*

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for it; and the decree does confer this benefit on Lord Aldborough, that it sets aside the transaction, but it requires him to repay the 750*l.* and interest which had been paid by Mr. Ollney; and as against him the decree is to operate by setting aside the annuity which he had purchased.

Now, when we consider that the bill does not attack the annuity upon any other ground than want of consideration, except that imputed combination between Mr. Robinson and Mr. Ollney, which is not established in fact, but which is disproved, I think that Lord Aldborough has got as much benefit from the court of equity in Ireland as he could reasonably expect, because he has the benefit of that transaction being set aside. He has not got the benefit of that transaction being set aside without repaying the money actually paid by Mr. Ollney for the purchase; and I apprehend that if the bill had impeached the transaction in a different and more correct mode than this, he never could have had ground, upon the facts as they stand here, to have got any decree to set aside that transaction without repaying the party who had actually paid for it. If a man puts into the hands of another the means of obtaining money from a third person, he never can be enabled to obtain a decree to get rid of that transaction arising out of the security which he has entrusted to another, and of which he (the party complaining) was himself the author.

That has been established in cases of voluntary deeds. In the case of *George v. Milbanke*, in 9th Vesey, 196, Lord Eldon established this: that even as against creditors, where the party had been the author of a

voluntary deed, and that voluntary deed had been used by the holder of it for the purpose of either raising money upon it or of sale, that even a creditor in the case of bankruptcy could not get it back without repaying the money that had been paid for it; but here the application is made by the author of this, which is a voluntary deed, to deprive the party of the benefit he is to derive under it. Now, a voluntary deed is not impeachable upon those grounds upon which we know that many transactions between man and man are set aside. Here the author of a voluntary security comes into a court of equity, and asks the court to set aside the transaction against the party who has purchased the benefit conferred by it without paying him that which he has paid himself. I think that the equity which the Court of Chancery in Ireland had administered in that respect is perfectly correct, and that the way in which the appellant has put his case is not sustainable against the decree against which he has complained.

Under all these circumstances, therefore, it appears to me that the Court of Chancery was quite justified in the decree which it has made, and that the appellant has failed in making out his case. I would propose, therefore, to affirm the decree below with costs.

LORD BROUGHAM.—I entirely agree with the view which my noble and learned friend has taken in both parts of this case, the latter part being the only part about which any doubt could exist. I also agree with him that Lord Aldborough has had quite as much benefit as he could have expected in the Court below. With respect to what has been said about the case of *Gowland v. De Faria*, and the doctrine supposed to be laid

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down in that case, two questions might arise: the first is, whether the doctrine really exists in that case which has been supposed there to exist. Upon that point I have some doubt; but if that doctrine is justly imputed to the case of *Gowland v. De Faria*, I entirely agree with my noble and learned friend in the view which he takes, and which was taken by Lord Lyndhurst in the case of *Potts v. Curtis*, that that doctrine, if it exists at all in that case, is now to be considered as over-ruled. It certainly never could have been the intention of the rule, with respect to expectant heirs dealing with a purchaser, that they should not have the power of dealing at all with their reversion. The rule laid down by the courts has certainly made that dealing very difficult; it has discouraged that dealing, for the purpose of protecting an expectant heir; it has made that discouragement very great indeed. But unless it is intended to say that the practical object of the rule was what undoubtedly in effect it would be were the doctrine supposed to exist in *Gowland v. De Faria* still maintained,—unless it is meant to say that they shall practically never dispose of their reversion at all, it appears to me clearly impossible to maintain that supposed doctrine.

I think in many cases such a rule would be any thing rather than a protection to an expectant heir. Upon the whole, therefore, I entirely agree with the view taken by my noble and learned friend; the matter never, indeed, admitted of any considerable doubt; it was only with respect to the point I first mentioned, and which was last dealt with by my noble and learned friend, that the case stood over for consideration.

Ordered, That the said petition and appeal be dismissed this House, and that the decrees therein complained of be affirmed; and it is further ordered, that the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal.

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[*27th February 1837 and 2d July 1840.*]

(From the Court of Exchequer.)

**HER MOST FAITHFUL MAJESTY DONNA MARIA the
Second, Queen of Portugal and the Algarves,
Appellant.**

**SIR RICHARD CARR GLYN, Baronet, THOMAS HAL-
LIFAX, RICHARD PLUMPTRE GLYN, CHARLES
MILLS, and GEORGE CARR GLYN, Respondents.**

Manoel Joaquim Soares, being indorsee of certain bills of exchange, brings an action against Messrs. Glyn and Co. on the bills, as the acceptors thereof. Messrs. Glyn and Co. file a bill of discovery in aid of their defence to the action, and get an injunction in the meantime against M. J. Soares, the plaintiff at law, and the Queen of Portugal, stating that the plaintiff at law is the mere agent of the Queen of Portugal; that he has no interest therein; that neither of them gave any consideration for the same; that the Queen of Portugal, by bringing the action in her agent's instead of her own name, and by attempting to appropriate to her own use the produce of the bills, commits a fraud upon the defendants. Upon a demurrer filed by the Queen of Portugal to the bill,—demurrer allowed, the Queen of Portugal not being a party to the record at law, reversing the judgment of the Court of Exchequer; the Lord Chancellor, Lord Lyndhurst, and Lord Brougham concurring, Lord Wynford dissentiente.

ON the 14th of November 1835 the respondents filed their bill of complaint against Manoel Joaquim Soares and the appellant, stating that they carried on in copartnership together the business of bankers in London, under the firm of Sir Richard Carr Glyn, Mills, Hallifax, and Company: that in the beginning of the month of December 1829, and thenceforward down to and in the first six months of the year 1833, and for some time afterwards, Don Miguel was de facto King of Portugal, and by himself and his agents exercised the government of the country: that in the early part of the year 1833 Don Miguel had occasion to raise a loan for the exigencies of the government, and that such loan was to be raised upon the security of certain scrip or bonds issued under the authority of Don Miguel and his government; and that the said government was to engage to pay to the holders of such bonds or scrip the sums therein mentioned within a period therein mentioned, and to pay interest thereon half-yearly at the rate therein mentioned; and that in March 1833 Messrs. Outrequin and Jauge, bankers in Paris, entered into an agreement with Don Miguel and his government for negotiating and raising such loan in Paris, and for remitting the same when raised to the treasurer of the royal treasury of Portugal, appointed by Don Miguel and his government, to be applied by such treasurer for the use of Don Miguel and his government: that the bonds were duly received by Messrs. Outrequin and Jauge as the agents of Don Miguel and his government, and Messrs. Outrequin and Jauge, between the 1st of March and the 30th of June 1833, subscribed and advanced, and procured to be subscribed and advanced by various other persons in

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Paris and elsewhere, considerable sums of money upon the security of the bonds, and remitted a great part of the amount so raised and subscribed to the treasurer of the royal treasury of Portugal appointed by Don Miguel and his government in bills of exchange, among which were six bills of exchange accepted by the respondents: that for some time previous to the 1st of January 1833, and down to the 7th of August 1833, Donna Maria Da Gloria, who now bears the title of Queen of Portugal, claimed to be Queen of Portugal, and her father Don Pedro Duke of Braganza, in her name and on her behalf, occupied Oporto in Portugal with the adjacent districts, and loans were raised in her name, and fleets and armies were maintained in her name: that Donna Maria the second alleged that Don Miguel was an usurper, and could not by any acts or contracts bind the nation or crown of Portugal, or the revenues thereof: that she repudiated the loan, and declared the same as well as the bonds null and void: that the object of the loan was to furnish Don Miguel and his government with the means of more effectually resisting the military operations of Donna Maria, and of supporting and maintaining his government: that the bills so remitted on account of the loan were remitted to Joaquim Fernandez Couto, and were received by him as the treasurer of the royal treasury of Portugal duly appointed by Don Miguel: that Baron D'Est, residing at Paris, drew upon the respondents, the bankers, six bills of exchange, for the sums of 650*l.*, 450*l.*, 550*l.*, 750*l.*, 450*l.*, and 550*l.*, payable to the order of Messrs. Outrequin and Jauge: that Baron D'Est, according to the custom of merchants, made each of the said bills in two parts; and by the

second of such parts required the respondents, the bankers, to pay the amount thereof to Messrs. Outrequin and Jauge, the first not being paid: that the said Baron D'Est, on or shortly after the 4th of June 1833, delivered the said several parts of the four first-mentioned bills to the said Messrs. Outrequin and Jauge, and on or shortly after the 7th of June 1833 he delivered the said several parts of the two lastly-mentioned bills of that date to the said Messrs. Outrequin and Jauge: that the said six bills were intended to be remitted as parts of the said loan: that the said Messrs. Outrequin and Jauge forwarded the first parts to Gower and Co., their agents in London, to present the same for acceptance, and to hold the same when accepted for the holders or endorsees of the second parts: that the first parts of the said bills were presented in due course by Gower and Co., and were accepted by the respondents: that the respondents were not subscribers to the said loan, but accepted the said bills in the course of their business as bankers on the account and by the directions of Edward Richardson, who kept an account with them as bankers; and that they had not any interest in the said bills, save as such acceptors on behalf of Edward Richardson: that in filing the bill they merely act as the agents of Edward Richardson, who has the sole management of the defence to the action and of this suit: that Messrs. Outrequin and Jauge duly endorsed each of the second parts of the said bills as follows:—"Pay to the order of the treasurer general of the royal treasury of Portugal value in account of the negotiation of the royal loan of Portugal:" that Messrs. Outrequin and Jauge transmitted the said bills so endorsed to the office of the

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royal treasury of Portugal at Lisbon, where the same were duly received by Joaquim Fernandez Couto, the treasurer of the royal treasury of Portugal appointed by Don Miguel: that Joaquim Fernandez Couto never executed the office of treasurer except under the authority of Don Miguel, and that he had no power to apply, dispose of, or negotiate any of the said bills so remitted to him except under the directions of the said Don Miguel, or of the ministers who acted as the agents of Don Miguel: that no consideration was given for the said bills by the government of Portugal except some of the bonds issued by Outrequin and Jauge: that in consequence of the misfortunes which had attended the armies and fleet of Don Miguel, and the approach of a hostile army near to Lisbon, the Duke of Cadaval, who commanded in Lisbon for Don Miguel and his government, abandoned that city in the night between the 23d and 24th of July; and on the 24th of July the said Donna Maria was proclaimed Queen of Portugal by the title of Donna Maria the second.

That in July 1833 Don Pedro and his adherents, acting on behalf of Donna Maria, took possession of Lisbon, and assumed the functions of government on behalf of Donna Maria; which government was founded on the destruction of the government of Don Miguel: that Don Pedro and his adherents seized and took possession of the second parts of the said bills of exchange and other bills on behalf of Donna Maria, and caused them to be endorsed to Manoel Joaquim Soares; and such endorsement of each of the second parts of the said bills purported to be signed by Joaquim Fernandez Couto; and such endorsements were dated the 7th of August 1833, which was after Joaquim Fer-

nandez Couto had ceased to be treasurer of the said royal treasury of Portugal on behalf of Don Miguel: that Joaquim Fernandez Couto had no authority to endorse the same for any purpose except for the purpose of their being applied for the service of the said Don Miguel and his government: that on or about the 7th of August 1833 the agents of Donna Maria remitted the said second parts of the said six several bills of exchange to Manoel Joaquim Soares, with directions to and in order that he might receive the same on behalf and for the use of the said Donna Maria and her government, and might remit the proceeds thereof to her or her government.

That in the year 1834 Don Miguel was obliged to quit Portugal, and Donna Maria remained in possession of the throne of Portugal: that the loan so raised and the bonds or scrip so issued as aforesaid were not recognized or repaid, or agreed to be recognized or repaid, by or on behalf of Donna Maria or her government; but, on the contrary thereof, Donna Maria and those who act in her name pretend that the said bonds and scrip of the said government are void, and not binding on the kingdom of Portugal, and they have repudiated the same, and declared the same to be null and void: that neither the said Donna Maria nor her government has given any valuable consideration for the said bills of exchange: that the possession of the second parts of the said six bills was obtained by Donna Maria, and the persons acting on her behalf, by fraud, accident, or violence; and they did not nor did any of them thereby acquire any beneficial interest in or any title to any of the said bills of exchange: that as soon as the said Messrs. Outrequin and

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Jauge were informed that the said bills of exchange had fallen into the hands of the government of the said Donna Maria, and the functionaries who were acting under her authority, they gave instructions to Gower and Co. not to deliver up the first parts of the said bills of exchange, and not to pay them to the said Donna Maria or her government, or to any person claiming title from them.

That, besides the said six bills, the said Baron D'Este drew upon respondents another bill in two parts, dated the 2d of June 1833, for the sum of 600*l.*, and endorsed the same to the order of Messrs. Outrequin and Jauge, who remitted the first part of the said bill to Gower and Co., who procured the same to be accepted by the respondents; and Messrs. Outrequin and Jauge endorsed the second part of the last-mentioned bill, in the same manner as the second parts of the said six bills were endorsed to the treasurer of the royal treasury of Portugal, value in account of the negotiation of the royal loan of Portugal, and remitted the same to the royal treasurer of Portugal at Lisbon on account of the said loan; and the second part of the last-mentioned bill came into the hands of Donna Maria or her agents, when they took possession of Lisbon, by the same means and under the same circumstances by and under which the first-mentioned six bills came into her or their hands; and they caused the same to be endorsed by Joaquim Fernandez Couto to Manoel Joaquim Soares, who obtained possession of the first part, and presented the same for payment to the respondents; and to such application the respondents gave the following answer, which appears on the protest:—"This bill being by the endorsement of Messrs. Outrequin

“ and Jauge made payable, not to an individual, but
 “ to a public officer, whose name does not appear, and
 “ circumstances having transpired which give the
 “ acceptors reason to doubt whether the person who
 “ has taken upon himself to endorse it is the person
 “ entitled by Messrs. Outrequin and Jauge, the ac-
 “ ceptors, though ready and willing to pay the amount,
 “ require before doing so satisfactory evidence of the
 “ right of Couto to endorse this bill as the treasurer
 “ general of Portugal, mentioned in Messrs. Outrequin
 “ and Jauge’s endorsement:” that thereupon Manoel
 Joaquim Soares instituted proceedings in the Tribunal
 of Commerce at Paris on the said last-mentioned
 bill against the said Baron D’Este and the said
 Messrs. Outrequin and Jauge, and also against divers
 other persons on others of the said bills which had
 been so remitted by Messrs. Outrequin and Jauge as
 aforesaid: that the claim of Manoel Joaquim Soares
 was resisted in the said suit, on the ground that he had
 no title to the said bill; and on the 23d of January 1834
 the said Tribunal of Commerce gave judgment against
 Manoel Joaquim Soares, and condemned him in costs,
 on the ground that he was not the real and bonâ fide
 holder of the bills in question, and that Soares had not
 given any consideration for the bills, and that they were
 not his property.

That on the 19th day of June Donna Maria caused
 an action to be commenced in the name of Manoel
 Joaquim Soares against the respondents on the bills of
 exchange, in the Court of King’s Bench, to recover
 what is due in respect of the said six bills of exchange,
 pretending that he was a holder of the bills for valuable

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consideration ; whereas the respondents insisted that he was a mere agent of Donna Maria or her government, and had no interest in the bills of exchange.

The bill charged that the action was brought solely for the benefit of the Queen of Portugal, and was in truth her action : that she had in her possession divers documents by which it would appear that the respondents were not liable upon the bills of exchange to her or to Manoel Joaquim Soares, and that he had no interest therein : that Manoel Joaquim Soares was compelled to endorse the same by duress : that the Queen did not intend to recognize the loan or pay the holders of the bonds or scrip, but that she and Manoel Joaquim Soares acted fraudulently in concert, in attempting to appropriate to their own use or the government of Donna Maria the proceeds of the bills of exchange.

And the bill prayed a discovery of the matters mentioned in the bill, and for a commission or commissions to examine witnesses at Lisbon, Paris, and elsewhere abroad ; and that in the meantime the appellant and Manoel Joaquim Soares might be restrained from proceeding in the action commenced or in any other action upon the bills of exchange.

To this bill the Queen of Portugal put in a demurrer on the grounds, first, that the respondents had improperly joined the Queen of Portugal as a defendant in the suit, who was not a party to the action at law brought by Manoel Joaquim Soares in the bill mentioned ; and secondly, that the matters mentioned in the bill, if admitted or proved to be true, would not constitute a valid defence to the said action at law.

The demurrer came on to be argued before the Chief Baron on the 15th day of December 1835, and, by an order dated the 19th day of January 1836, was by the Chief Baron overruled.

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From this order this appeal is brought.

Mr. Pemberton and Mr. Roupell for the Appellant.—

Appellant's
Argument.

If this judgment is maintained it operates as a perpetual injunction, and the acceptor will continue to hold the money; this is not a bill for relief or interpleader. In no case, except against underwriters, can a bill be filed against any but parties to the record, and in those cases the bills generally pray for the delivery of the policies, and the plaintiff (the broker) must aver for whom the insurance is made. There is no jurisdiction against a foreign sovereign, unless he comes here and sues; *King of Spain v. Hullett*.¹ Again, the discovery is not available in the action; *bishop of London v. Fytche*² is said to be an exception; but the register's book proves that the patron was the only defendant. In *Fenton v. Hughes*³ the bill charged interest in a defendant to a bill of discovery, and Lord Eldon allowed the demurrer. In all cases a party not upon the record may be called as a witness for the party seeking the discovery. A sovereign is not amenable unless he files a bill; if he be amenable, the King of England must be equally so to foreign courts. How can a bill be filed against the sovereign power of America, which is "the people of the United States"?

¹ 7 Bligh, 359.

² 1 Bro. C. C. 96.

³ 7 Vesey, 287.

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The following cases were cited :—*Le Texier v. the Margravine of Anspach*¹, *Dummer v. the Corporation of Chippenham*², *Vandam v. Monro*³, *Mayor of London v. Levi*⁴, *Tooth v. Dean and Chapter of Canterbury*⁵, *Plummer v. May*.⁶

Respondents
Argument.

Mr. Knight Bruce and Mr. James Russell for the Respondents.—The equity is that no consideration was paid for the drawing and accepting the bills. Declarations by a party interested in the action are evidence against the plaintiff, *King v. Inhabitants of Hardwick*⁷, *Bell v. Ansley*⁸, *Smith v. Lyon*⁹, *Alves v. Banbury*.¹⁰ A foreign sovereign has no privilege. A plaintiff has a right to file a bill of discovery against any party whose declarations would be evidence for the defendant in the action¹¹, *Wych v. Meal*.¹² The Queen of Portugal could not be examined as a witness, because she is in fact an interested party, though not a party to the record; *Fenn v. Granger*¹³, *King v. Inhabitants of Woburn*.¹⁴ The Queen of Portugal has documents in her possession; *Day v. Drake*¹⁵, *Angerstein v. Wentworth*.¹⁶

Appellant's
Argument.

Mr. Pemberton in reply.—It is said that in all cases in which an action is brought any one person interested

¹ 15 Vesey, 164.

² 2 Anstruther, 502.

³ 3 Simons, 63.

⁷ 11 East, 578.

⁹ 3 Campbell, 465.

¹¹ Lord Redesdale's last edition on Pleadings, pages 53, 111, 148, 161, 185, 188, 283.

¹³ 3 Pere Williams, 310.

¹⁴ 10 East, 395.

¹⁶ 1 Fowler, 227.

¹⁴ Vesey, 245.

⁸ 8 Vesey, 408.

⁶ 1 Vesey, sen. 426.

¹⁶ 16 East, 141.

¹⁰ 4 Campbell, 28.

¹³ 3 Campbell, 177.

¹³ 3 Simons, 64.

in the subject of the action, and whose declaration would be evidence in the action, may be made a defendant to a bill of discovery; if that be so, then all persons interested may be made defendants. The passage from Lord Redesdale does not apply to cases of discovery.¹ *Plummer v. May* is referred to as an authority, but that was a bill for relief. *Day and Drake* was compromised upon the threat of an appeal. The object of a bill of discovery is to examine your opponent, whom you cannot examine at law; it must, therefore, be confined to those who cannot be examined at law. The bill is not a bill for relief, offering to bring the money into court.

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LORD CHANCELLOR.—This case comes before this House upon a demurrer by one of the defendants to a bill of discovery, which was filed by Messrs. Glyn and Company, who were the acceptors of certain bills of exchange. The holders of those bills having brought an action on the bills, a bill of discovery was filed, which undoubtedly the defendants at law had a right to file as against those who were pursuing them at law. So far no objection can be taken to the proceeding; but in addition to those who were pursuing the plaintiffs at law, the defendants at law made another party defendant in the suit in that bill of discovery, namely, the Queen of Portugal. How the Queen of Portugal became a party to the cause below, and what immediate process was served upon her, is not now under consideration; she was, by virtue of certain orders which have not

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¹ Lord Redesdale's last edition on Pleading, page 185.

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second of such parts required the respondents, the bankers, to pay the amount thereof to Messrs. Outrequin and Jauge, the first not being paid: that the said Baron D'Est, on or shortly after the 4th of June 1833, delivered the said several parts of the four first-mentioned bills to the said Messrs. Outrequin and Jauge, and on or shortly after the 7th of June 1833 he delivered the said several parts of the two lastly-mentioned bills of that date to the said Messrs. Outrequin and Jauge: that the said six bills were intended to be remitted as parts of the said loan: that the said Messrs. Outrequin and Jauge forwarded the first parts to Gower and Co., their agents in London, to present the same for acceptance, and to hold the same when accepted for the holders or endorsees of the second parts: that the first parts of the said bills were presented in due course by Gower and Co., and were accepted by the respondents: that the respondents were not subscribers to the said loan, but accepted the said bills in the course of their business as bankers on the account and by the directions of Edward Richardson, who kept an account with them as bankers; and that they had not any interest in the said bills, save as such acceptors on behalf of Edward Richardson: that in filing the bill they merely act as the agents of Edward Richardson, who has the sole management of the defence to the action and of this suit: that Messrs. Outrequin and Jauge duly endorsed each of the second parts of the said bills as follows:—" Pay to the order of the treasurer " general of the royal treasury of Portugal value in " account of the negotiation of the royal loan of " Portugal:" that Messrs. Outrequin and Jauge transmitted the said bills so endorsed to the office of the

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record. Bills of discovery in aid of the defence to an action are permitted for the purpose of obtaining from the antagonist at law the discovery of matter which, being admitted by him, may aid the defence, and not for the purpose of procuring evidence. It is now nearly forty years since Lord Eldon, in *Fenton v. Hughes*, reported in 7th Vesey 287, allowed the demurrer of the defendant Bate to a bill of discovery which, according to the statement of the bill by the Vice Chancellor in *Irving v. Thompson*, in 9th Simons 23, alleged that he, Bate, was interested in the success of the action, and was to be entitled to all or some part of the money to be recovered thereby, and that he would be liable to pay all or some part of the costs in case *Hughes*, the plaintiff in the action, should not recover. Lord Eldon observed, that Bate would not be a witness for the plaintiff at law on account of his interest, but that the defendant might examine him; and that the superior advantage of discovery by answer, particularly as to the production of papers, was not sufficient to make an exception to the rule that a bill of discovery will not lie against a mere witness.

In 1803, in the case of the *Mayor of London v. Levy*, in 8th Vesey 403, and in 1808 in *Le Texier v. the Margravine of Anspach*, in 15th Vesey 164, Lord Eldon laid down the rule in the same way. In 1813 Sir Thomas Plumer acted upon this rule in *Powell v. Yeats*, as stated by the Vice Chancellor in *Irving v. Thompson*, as he did in the same year in *Whitworth v. Davis*, in 1st Vesey and Beames 550. Lord Lyndhurst, in *Tooth v. the Archbishop of Canterbury*, in 3 Simons 63, and in *Few and Guppy*, in *Hare on Discovery*, 124, recognized and acted upon the case of *Fenton v.*

Hughes. In 1835, in the case of *Glyn v. Soares*, in 3 Mylne and Keen, 450, at the Rolls, I considered the rule as clearly settled; and in 1839 the Vice Chancellor, in *Irving v. Thompson*, reviewed all the cases and acted upon the rule; and in the present year, in the case of *Kerr v. Rew*, I thought myself bound by the pendency of this case to look into all the authorities, and found no ground for doubting the rule as I had always understood it; and therefore allowed a demurrer, by a party made a defendant to a bill of discovery by underwriters, upon an allegation that an action upon a policy brought in the name of another as agent was in fact brought for the benefit of the party demurring, and that he was exclusively interested in the subject matter of the suit. It was indeed assumed in the Court below, that in cases of actions upon policies it was the common practice to make the owners defendants to bills of discovery, although they are not parties to the record at law. What may have been the recent practice of the Exchequer I am not very conversant with; but I am very confident that if there be any such practice in the Court it is of very recent date, and certainly at variance with the practice of the Court of Chancery, as the cases of *Irving v. Thompson* and *Kerr v. Rew* prove. Indeed, at the time when I was familiar with what was going on in the Exchequer, it was not usual to file bills of discovery in such cases: they all prayed relief. I have looked through many precedents, which, from the names attached to them, must cover a period not much short of a century, and I find but one which does not pray relief. The case of *Vandam v. Monro*, in 2d Anstruther 502, as there reported, would appear to have been a bill of discovery; and if so, it would be an instance of a bill

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of discovery filed against the assured, not parties to the action ; but, considering what the general practice was, it was most probably a bill praying relief.

Some cases, however, were referred to by the Lord Chief Baron as establishing a contrary doctrine, and some observations of Lord Hardwicke, in *Plummer v. May*, in 1st Vesey 426, were relied upon ; but it is obvious that the bill in that case prayed relief, Lord Hardwicke saying, that there were charges in it which, if proved, would entitle the plaintiff to a decree against the defendant for an account. The bishop of London v. Fytche, in 1st Brown 95, was also relied upon as an instance in which a bill of discovery was filed against a defendant who was not a party to the action. I have had the registrar's book searched, and it appears, under date 13th of June 1780, reg. lib. at folio 506, that the report in that respect is erroneous, and that Eyre, the clerk, was not a party to the bill of discovery. *Dummer v. the Corporation of Chippenham*, 14 Vesey 245, has also been referred to ; but Lord Eldon's observations, in page 253, only showed that, in his opinion, the principle of permitting a plaintiff in a suit against a corporation to seek discovery from an officer of the corporation might be extended to individual members of it. *Batch v. Wastell*, in 1st Pere Williams 245, appears to be a bill for relief and not for discovery only, and the object was to make assets in the hands of the defendant liable to the plaintiff's judgment. The cases of officers of corporations stand on principles entirely peculiar to themselves, and have obviously no application to the present case. *Angerstein v. Wentworth*, 1st Fowler 227, does not prove much, but as far as it goes, it is an authority in favour of the demurrer.

Thus all the cases which have been supposed to support the doctrine upon which the judgment of the Court below proceeded, when examined into, are proved to want those circumstances which, from the mistake of the reporters, have been supposed to make them authorities for that purpose. A proposition was suggested, which is, I believe, quite new, namely, that a bill of discovery may be filed against any one whose admissions may be used for the plaintiff at law. This proposition I conceive to be wholly untenable, and what affords the most certain answer to it is, that in *Fenton v. Hughes* the declarations of Bate, assuming the facts to be as stated in the bill and admitted in the demurrer, would have been admissible in favour of the plaintiff to the bill of discovery. It is true that examining a person as a witness, who has important papers in his possession, is far less effectual than obtaining his answer to a bill of discovery; but this was fully considered by Lord Eldon in *Fenton v. Hughes*, and yet he held that this consideration, though well founded in fact, did not justify filing a bill against a person who might be examined as a witness. The demurring party might in this case be examined as a witness for the plaintiff to the bill of discovery, the defendant at law; as may the assured, not a party to the record for the underwriter, as stated by Lord Abinger in his judgment on this case.

The case of the lessor of the plaintiff in ejectment being compelled to answer a bill of discovery is no authority against the rule, but he is considered in all respects as a party to the record, which the assured is not, and therefore may be examined as a witness; and, therefore, if your Lordships were to sanction the principle upon which the judgment of the Court below has

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proceeded, a very mischievous innovation would be made in the rules and practice of courts of equity as to compelling discovery, and an inquisitorial power would be established, by which persons not parties to any litigation might be compelled, in a contest between others, to discover the secrets of their own affairs, upon an allegation, which could not perhaps be denied, that they had some interest in the subject matter of a litigation between others; and as, if the defendant at law be entitled to the discovery in aid of his defence, the action cannot be permitted to proceed till such discovery be obtained, an easy expedient would be afforded of defeating the enforcement of legal rights by action at law, by filing bills of discovery against persons not parties to the record and out of the jurisdiction, upon an allegation of their being interested in the subject matter of the action. Of the possibility of such an abuse the present case furnishes a striking example. The rules of courts of equity, as they have hitherto existed, cannot lead to such an abuse; and I trust that your Lordships will maintain those rules, and thereby prevent the recurrence of such injustice in future. I therefore move that the judgment of the Court below be reversed, and the demurrer allowed.

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LORD LYNDBURST.—It is quite unnecessary for me to go through the cases which have been referred to; it is sufficient for me to say, that I entirely concur in the opinion which has been pronounced upon this case. I consider the decision in *Fenton v. Hughes* as a decision precisely in point upon the present occasion. It was suggested that Bate had no interest; the record has been searched, and the notes of the case have been

examined, and it appears that he had a direct interest; that it was so asserted upon the record, that Bate was to share a part of the money that was to be recovered, and was liable or undertook to pay the whole or a part of the costs. The decision in *Fenton v. Hughes* has been acted upon from that time to the present, in two instances by Lord Chancellor Eldon, who considered the case with great care and great attention at the time. It has been confirmed by the case of *Powell v. Yeats*, about which the Master of the Rolls, Sir Thomas Plumer, at first doubted; but when the facts of *Fenton v. Hughes* were distinctly brought to his attention, he confirmed the judgment in that case, and acted upon it in the decision he pronounced in *Powell v. Yeats*.

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The same point came before the Court during the time I held the Great Seal. I considered the law as settled by the case of *Fenton v. Hughes*, and acted upon it in the case referred to. Since that time it has come before the Court in two or three instances during the time of the present Vice Chancellor, who pronounced a most elaborate judgment in the case of *Irving v. Thompson* on this very point; the judgment being, I believe, the more elaborate in consequence of the decision from which this is an appeal. The decision which is now appealed from was founded on a misapprehension of the case of *Fenton v. Hughes* as to the facts of that case, and there is undoubtedly something equivocal, ambiguous, and vague in the report, in consequence of which the Vice Chancellor got the original brief containing the facts, and containing the bill in which the facts are such as my noble and learned friend has stated, and such as I have mentioned.

There was another case which has been relied upon,

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which was considered as an authority for the judgment in this case; I mean the case of the bishop of London v. Fytche; that was founded upon the apprehension that Eyre was one of the defendants on that record, whereas upon examining the record it appears that Fytche was the only defendant. It appears to me that that is not an authority to oppose to the authority of Fenton v. Hughes, which has been considered as law from that time to the present. I repeat what I before said, that any person looking to the judgment of Lord Eldon, in the case decided by him, will see that he considered the case with his usual attention and his usual care, and that in pronouncing the judgment he must be considered as pronouncing no law, but that which has been from that time considered as the rule of Court. I am therefore humbly of opinion that the judgment ought to be reversed.

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LORD BROUGHAM.—My Lords, agreeing entirely as I do with my noble and learned friends who have addressed your Lordships, I shall not trouble your Lordships further than by expressing my entire concurrence. I agree entirely as to the cause for postponing this judgment; the judgment has been postponed principally for the purpose of having those cases looked into upon which it was said that the judgment of the Court of Exchequer had been founded. The case of Fenton v. Hughes was a good deal commented upon at the bar in the course of the argument, as also the case of the bishop of London v. Fytche. There is no doubt that the error which has prevailed in the reports of those cases, and the great vagueness of the case of Fenton v. Hughes, have given rise to this decision in

the Court of Exchequer. The manifest error in the case of the bishop of London v. Fytche, and, I think, another error which appears in the report of some third case gave rise to considerable discussion, and to some doubt at the hearing; and according to my recollection, it was principally with a view of having this mistake and difference with respect to the cases examined, that the postponement of the judgment has taken place. It really does appear now very satisfactorily, from the full inquiry into all those cases in the late case of Irving v. Thompson before the Vice Chancellor, that those cases have been either mistaken or misrepresented, and that from those circumstances the error in this judgment of the Court of Exchequer has arisen.

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LORD LYNTHURST.—I believe the third case to which my noble and learned friend alludes is not a single case, but I believe it is that class of decisions which is supposed to have existed in insurance cases.

LORD BROUGHAM.—I believe so.

LORD LYNTHURST.—It would be desirable to ascertain whether those were bills of discovery or bills for relief; upon examination it turns out that the whole course of proceeding in those cases was not in the nature of bills for discovery, but bills for relief; and I apprehend, therefore, what is supposed to be the modern practice arises from misapprehension of the form of those bills.

LORD WYNFORD.—I rise to address your Lordships certainly with considerable reluctance, because I am bound to state to your Lordships that I agree in opinion with the noble and learned judge (my Lord Abinger) who decided the case in the Court below, and

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I have the misfortune to differ from my noble and learned friends who have given their opinion upon this occasion.

I never heard before of any case being misreported, except the case of the bishop of London v. Fytche. It was certainly stated at the time of the hearing here, that there was a mistake in the report of the bishop of London v. Fytche, inasmuch as a person of the name of Eyre, who was supposed to have been a party in that suit, was actually not a party; but with respect to any mistake or misreport in the case of Fenton v. Hughes, I never heard of any.

LORD BROUGHAM.—I did not say that it was misreported, but that there was an uncertainty with respect to the facts of that case which has since been cleared up.

LORD WYNFORD.—I was not aware that there was any uncertainty as to the facts; and as the facts are stated in the report which we had to refer to at the time this case was under consideration, it appeared to me then, as it appears now, that it was a very strong authority indeed against the opinion which my noble and learned friend has this day pronounced.

Your Lordships are not in possession of any of the circumstances of this case, or you would at once perceive that such gross injustice never was worked in any cause as will be worked in this, if your Lordships pronounce the judgment which it is recommended to you to pronounce in this cause. It is fit that you should be put in possession of some of these facts, and should know how some of the facts have been dealt with in another country. I have been in the habit of thinking that our laws were the wisest in the world,—that they

were better administered in this country than in any other; I shall be bound to confess, after the judgment which I am afraid will be pronounced to-day, "that they manage things better in France." While we have been sleeping over this cause, they have in France got at the facts, and in France they have decided according to the justice of the case. They have disposed of the Queen of Portugal and her agents in that country as I had hoped your Lordships would have been enabled in this country to dispose of Her Majesty the Queen of Portugal, and her agent, Mr. Soares, in this country.

My noble and learned friend on the woolsack has stated, that if your Lordships uphold the judgment of my noble and learned friend, commercial people, holders of bills of exchange, will be in a fearful situation, because it would only be necessary to make some prince in Europe or America (but fortunately for the purpose of this cause, but though unfortunately for other purposes, there is but one prince in America who can be made) a party to any such cause;—that by making any foreign prince a party to the cause the action may be tied up, and no holder of a bill of exchange can ever recover upon it. There is a very short answer to that argument; how can that be done when it is stated, as it is in this cause, that the Queen of Portugal is the sole party to the cause and has the sole interest, and that Mr. Soares, the person whose name appears upon the record, is her agent,—a fact which is admitted? Can it be said, that if you decide that such a person is bound to make a disclosure, you would be opening a door for the filing of bills calling upon any sovereign of Europe or America to answer to the bill? That allegation, I

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conceive, cannot be supported. I confess I am a little surprised that my noble and learned friend, who has so general and accurate a knowledge in matters of equity, should have had recourse to such an argument as that which he has used.

I found my observations in this cause upon this simple allegation, that the Queen of Portugal, who refuses to answer, is the sole person who can know any thing of the facts; that the Queen of Portugal, who refuses to answer, is the sole person who has any interest in the cause; for my noble and learned friend has admitted that what is charged in this bill, if not denied, must be taken to be true. It is charged in the bill, and it is not denied, that Mr. Soares had admitted that he has no interest whatever in this cause; that the only party upon the record who has the whole interest in this cause is the Queen of Portugal, who refuses to make any disclosure, and by refusing to make any disclosure will obtain a sum of money from the merchants of this country to which she has not the slightest pretence upon earth: a fouler fraud,—if I may use such a word as applicable to parties in the situation in which these parties are,—a fouler fraud was never committed upon the merchants of this country than will be committed if this judgment should pass, as I am very much afraid it will pass.

What are the facts of the case? Some time about the year 1829 the government of Portugal was de facto in the hands of Don Miguel. Don Miguel negotiated a loan with two persons in France of the names of Outrequin and Jauge, and bonds were given to those persons, which bonds were to be delivered to different persons in the form of scrip. To the persons who con-

tributed to that loan the loan was to be paid; bonds were given to those parties, and the loan was to be raised by bills drawn upon persons in England and in France,—bills exactly under the same circumstances with those in the present case. The decision in the court of France, which has disposed of the Queen of Portugal, is a direct decision upon this very point now under consideration. Bills were to be given in satisfaction of raising this loan on merchants in England and France. The bills upon England were endorsed by a person then a minister of the Court of Portugal, a person of the name of Couto; they were transmitted to this country, and were presented for acceptance to the present defendants; they were accepted by the present defendants. Those bills were to be given to the person who was the endorsee of the second set of bills. At this time Don Miguel was de facto the Governor of Portugal. By Don Miguel this loan was raised. Don Miguel was in the meantime dismissed from the Court of Portugal; he was turned out as an usurper, and Donna Maria was placed in his stead. The first act of Donna Maria was this: she repudiated the loan of Don Miguel. Perhaps she was right in that; she said that Don Miguel was an usurper, and therefore the bonds he had given and the loan he had raised were not binding upon the kingdom of Portugal, and would not be paid. So far she was right; but if it was right to say that the bonds were only invalid, it was only right to remit, to those who had given the bills, the bills which were advanced for the purpose of raising that loan. But though the loan was declared void, that was not thought proper by the council of Portugal. The council of Portugal, after Don Miguel had left that

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country, sent for Mr. Couto, who had been actually deposed from his situation, who was appointed to that situation by Don Miguel,—never held any situation of that kind under Donna Maria, and he was compelled against his inclination, for he had some scruples of honesty about him, to endorse these bills to a Mr. Soares, in order that Mr. Soares might recover the money for those bills in this country, and remit it to Donna Maria, who had repudiated the loan, and who had therefore no more pretension to touch those bills than I have, or than any one of your Lordships. Immediately upon this Don Miguel gave notice to the acceptor of the bills not to pay them to Soares, and not to accept them on account of Soares. Outrequin and Jauge, the two persons in France, gave also the same notice not to pay the bills, because they said Soares was endeavouring to recover a sum of money for the Queen of Portugal which she had no right to, having repudiated the loan, and having declared that the bonds were void.

Now, after this, can any one allow on any pretence the Queen of Portugal, who is the real party in this cause, and the only party in this cause, to recover in this action upon bills of exchange, the consideration of which she herself by her own act has repudiated? I state that it would be an act of such gross injustice,—I hear my noble and learned friend say, and I am obliged to him for the admission, that it would be an act of gross injustice,—it cannot be denied to be an act of gross injustice; and I should be very sorry, if, in consequence of any supposed technical rules of the Court of Chancery, your Lordships were to be made parties to such injustice. This is a case of so much importance, not only with respect to these parties to whom it is of

very great consequence, but with respect to the administration of justice in general, that I, for one, with all my respect for the Court of Chancery, would rather that it should be blown up, than that this cause should be decided in the manner in which it is proposed to be. If we cannot do better here than they do in France, if we cannot get at the facts and decide upon the justice of the case, but are tied up by these absurd forms, for which no reason has been attempted to be given by my noble and learned friends, it would be better that we should have no Court of Chancery at all than one so fettered.

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LORD LYNTHURST. — They did not examine the Queen of Portugal in France.

LORD WYNFORD. — They did not examine the Queen of Portugal, I am obliged to my noble and learned friend; we do not propose to examine the Queen of Portugal here; I know we cannot examine her here, but we can get some information as to who the persons are who may be examined here. We may do that which is asked for by this bill; we may have a commission sent not only to Portugal but to France, to examine the only persons who can know any thing of the facts connected with the cause.

LORD LYNTHURST. — We do not decide that a commission may not issue.

LORD WYNFORD. — My noble and learned friend says, we do not decide that a commission may not issue. I know that; but who can issue that commission, unless the Queen of Portugal will, through some minister of hers, kindly inform us who are the persons to whom the commission is to be sent, and from whom the information is to be obtained. We are kept entirely in

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the dark upon this subject, and by keeping us in the dark the Queen of Portugal will get into her pocket money which she has no more pretence for getting into her pocket than she has for taking the money of your Lordships.

But it is said, there is a distinct rule in the Court of Chancery, which prevents this being done. I am bound to suppose that there is such a rule, after my noble and learned friends, for every one of whom I entertain so much respect, have stated that there is such a rule, and that the thing is not to be doubted about. I am bound to suppose that all the reporters must be mistaken; but if the reporters are not mistaken, there is no such rule in the court of equity. If there is such a rule in the court of equity in this country, I beg to say in a vast number of cases it is absolutely impossible that justice can be got at. Suppose a bill of exchange obtained in the most fraudulent manner in the world, under circumstances of disgusting fraud, the man who gets hold of the bill of exchange will never bring an action upon that bill himself; he will hand it over to some person, —put an endorsement on it; he will get half a dozen endorsements put upon that bill, if, in consequence of that, he cannot be called upon to answer, and disclose all those circumstances. I am aware that if you have all those endorsers you may examine them as witnesses in the case, but you cannot get at the man by whom the bill has been passed from hand to hand, but whose name did not appear upon the back of the bill.

But there is another thing. It is of very little use to get hold of any facts in court unless you have a knowledge of those facts beforehand, in order so to use those facts at the time of the trial that they may be rendered

advantageous to the party. My noble and learned friend has admitted that a bill of discovery is much better in many cases than the examination of a witness. In the examination of a witness the answers come upon you by surprize, but by means of a bill of discovery you have it in your possession, and have an opportunity of thinking of it before it is used in court; and you not only know how the information is to be used when it is obtained, but you find out the means by which other matters can be examined in a court of justice, which it is impossible you could know any thing about, or be aware of, if the parties were not to be called upon to give evidence upon them before they come to a court of justice.

I will, in the first place, take the liberty of stating to your Lordships, that it does not appear to me that Lord Redesdale, one of the most eminent men who ever practised in a court of equity, was ever aware of any such rule as that which is now suggested. It is there that a bill of this nature, that is, a bill of discovery, must state the matter touching which a discovery is sought, the interest of the plaintiff and defendant in the subject, and the right of the first to require the discovery from the other.

Further, in the same book Lord Redesdale states that bills have been filed to impeach deeds on the ground of fraud. Now here not only no such rule as this which is relied on upon this case, for the purpose of defeating the merchants of England and putting the money into the pocket of the Queen of Portugal, is advanced, but the direct contrary is stated by Lord Redesdale, for it is equivalent to that. The noble and learned Lord says,
 “ Where bills have been filed to impeach deeds on the

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“ ground of fraud, attornies who have prepared the deed and other persons have been made defendants, for the purpose of obtaining a full discovery.” Those were bills of mere discovery, and in bills of mere discovery attornies, who, your Lordships know, cannot be parties to the cause, and other persons, certainly not meaning other parties to the cause, may be made witnesses, for the purpose of getting at a full disclosure of the fraud, or any thing of that nature. If you were tied down to an examination merely of persons whose names are upon the record, I am sure in ninety-nine cases out of a hundred they will escape, as fraud of the grossest kind will unquestionably escape in the case now under discussion.

Lord Redesdale says in another passage, “ As the object of the Court in compelling a discovery is either to enable itself or some other Court to decide on matters in dispute between the parties, the discovery sought must be material either to the relief prayed by the bill, or to some other suit actually instituted or capable of being instituted.” Now, I should think, your Lordships will say that this light never broke in upon Lord Redesdale, or he would not have written that part of his treatise respecting bills of discovery if such a thing had occurred to him.

Now this is the best book I can find, and the text book upon this subject. Your Lordships will find that in the case of *Wych v. Meal*, in 3d Pere Williams 310, Lord Talbot ordered the secretary of the East India Company to put in an answer, because the Company would not answer on oath; and he said, though the answer might not be read against the Company, yet it might be of use to direct the plaintiff how to draw his inter-

rogatories. There is not a word said by Lord Talbot in that case applicable to this distinction, and we do not look into cases merely to find exactly the same facts, or to find parties exactly under the same circumstances; but we look into cases to discover general principles. I say, this case establishes the principle laid down by Lord Redesdale, that the Court will grant a discovery where it is necessary for the purposes of justice, the parties seeking it having an interest in obtaining it from the party from whom it is sought. My noble and learned friends, one or two of them, mentioned this case of the secretary of the East India Company, but none of them, upon principle, attempted to distinguish it from the present case. The secretary to the East India Company was no party to the record, but he was examined in the case, because the parties who were parties to the cause could not be compelled to make a disclosure upon oath. If the Queen of Portugal cannot be made a party, and cannot be obliged to make a discovery, or to state who her officers are, or give us any means by which we can find out the circumstances under which she has obtained these bills, or afford us any opportunity whatever of investigating the transaction,—if, I say, she can get this money into her hands, allowing the record of the court of equity in this country to charge her without denial on her part, that will occasion one of the grossest frauds that was ever committed in any country.

I do not recollect whether any objection was made to the accuracy of the report, in Vesey senior, of Plummer v. May. A bill was brought in that case by an heir-at-law against witnesses.

The demurrer was overruled on the ground that the

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deed admitted every thing that was well pleaded, and that there was an express allegation in the bill that the defendant pretended to some right or interest under the bill. It will appear whether there was any thing further passed that I am not aware of, but nothing more appears, from the note which I made, to have passed. The reason given was that the witnesses had not an interest; if that be any part of the reason, it is very applicable to this case. The Queen of Portugal stands in a very different situation from the witnesses; as the plaintiff, she not only has an interest, but she has the whole and entire interest, and all which is now doing is doing for her. If my noble and learned friends can prevail upon your Lordships to overturn this judgment, the Queen of Portugal will obtain this money in her pocket, which otherwise she will never get.

With respect to the case of *Fenton v. Hughes*, it is said that that judgment is discovered not to have been given on the ground stated by Vesey; but of that I know nothing. An action *qui tam* was brought in the name of the defendant, as the foundation of a bill of discovery and a bill of relief. The action was brought at the instance of the other defendant, Bate, under prayer for discovery, and a prayer for relief against both defendants, and that the plaintiff might have the benefit of the trial of the action. That does not look like a bill brought for relief, but for the purpose of obtaining facts to be used in an action at law commenced in the name of the defendant Hughes, not Hughes and Bate. Bate demurred to the bill, that the plaintiff had not shown any right to call upon him in equity for discovery, and that he might be examined as a witness. The demurrer was allowed on what ground? On the ground that Bate

was a mere witness, having no interest. It was decided upon that ground, and I suppose that to be an accurate report. It must be a very inaccurate one if that is not the case; there is in that report no notice taken of his not being a party in the cause. If this be the rule of courts of equity, would not Lord Eldon, who, we know, had a short way of disposing of causes (for he was in the habit very much of disposing of causes in a short way, without going through all the points,) would not he have said at once, you cannot go on here, Bate is no party to the cause, there is an end of it. But Lord Eldon goes into all the cases, and decides it upon the point, that the party who called upon Bate had no interest.

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The case I am about to allude to is a decision of the noble and learned judge in this very case. I think that every word is entitled to attention, not only from the great authority of that noble and learned judge——

LORD LYNTHURST.—Hear, hear.

LORD WYNFORD.—Though he has not had so much experience in courts of equity as my noble and learned friends now present have had, yet he has heard more of what passes in causes in general than almost any man in the country, and certainly was one of the most distinguished advocates ever at the bar.

LORD LYNTHURST.—Hear, hear.

LORD WYNFORD.—Though Lord Abinger has not attended so much to the courts of equity, he has been called upon, in the courts of common law, to attend to pleadings and answers in courts of equity. Lord Abinger says in this case, “The question is, whether a party suing is agent for another?” That is the very point which has not been touched upon yet; so there is

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in this case — Soares is the agent for the Queen of Portugal. *Facit per alium facit per se*: what the Queen of Portugal does by her agent, she does by herself, though her name is not upon the record. The name of Soares is upon the record in no other way than as agent for the Queen of Portugal. It would appear ridiculous to say, you shall not put the Queen of Portugal to answer because she does not appear upon the record, though it is admitted that the very persons who did appear had no interest in the concern, and that Her Majesty was the person solely interested. Lord Abinger, after observing that Soares proceeding in his own name, but really on behalf of the Queen of Portugal, he ought to be restrained in his action until the party for whom he acts puts in his answer to the bill of discovery, goes on to say, “Why not apply that principle to an action brought on a bill of exchange or other security?” I say, why not? Is it possible on principle to distinguish these cases? It is known that most of the persons required to answer are not parties to the record; but they are the persons who can give the best information, and they are therefore required to give that information. That is the rule of common sense, and I trust it will not be prevented operating by the Court’s being bound down by the technical rules of the Court of Chancery, even if I were obliged to confess, which I do not, that the authorities were all decidedly against me.

There is another case which I ought to mention, decided by my noble and learned friend on the woolsack, the case of *Glyn v. Soares*, in *3 Mylne and Keen*: —“The acceptors have undoubted right to have that

“ fact ascertained, whether the party holding the bill
 “ is or is not the person who derived title under the
 “ individual or officer to whose order the bills were
 “ made payable ; beyond that, they have no interest in
 “ the subject matter. It cannot be material to them
 “ how Messrs. Outrequin and Jauge had the money
 “ in their hands,—why it was they wished to remit it to
 “ Portugal. This is not a bill for the purpose of
 “ administering equities between the parties ; it is not
 “ a bill in which the question who is entitled to the
 “ money can be discussed. It is merely a bill to aid
 “ the defence to an action at law, and it cannot cor-
 “ rectly or properly raise any question which is not
 “ material for that purpose.” My Lords, I entirely
 concur in that ; you cannot go into any question which
 is not material for the purpose for which the bill is filed,
 that is, to get at evidence which is shown to be material
 for the purpose of defeating an action unjustly brought
 against the person who filed the bill.

On these grounds I feel it to be my duty to support
 the judgment my noble and learned friend has pro-
 nounced ; and after having heard the opinions my
 noble and learned friends have stated to your Lordships,
 I take them to proceed upon a mere technical ground,
 for which there is no pretence, in my humble judgment ;
 and if that which they have expressed is declared to be
 the law, if I continued my attendance in parliament, I
 certainly would have brought in a bill to try whether
 I could prevail on the House to get rid of a law which
 must be pregnant with so much mischief, and which
 will tend to inflict so much injury upon the country. I
 have felt this a very painful duty. I have stated the
 judgment which, in my opinion, you ought to give, and

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feeling decided in my opinion, I could not reconcile it to my conscience not to come here and to state to your Lordships that I enter my protest against the decision about to be made.

LORD BROUGHAM.—I did not say that *Fenton v. Hughes* was reported upon other grounds than those upon which the judgment was pronounced. What I said was, that there was some vagueness on the part of the reporter which had misled the Court below, and it is quite clear that the Lord Chief Baron was misled respecting the grounds of that decision by what passed before the Vice Chancellor; for he says Lord Eldon took time to consider and said, “that he had looked with
“ great anxiety into the bill to see if he could discover
“ any sort of interest that Bate had to make him any
“ thing but a witness, and he goes through the topics
“ to show that Bate was clearly a witness at law for
“ the party who filed that bill; that if he could not
“ be a witness on the other side by reason of any inte-
“ rest yet undiscovered, that was for the advantage of
“ the plaintiff in equity.” Then my Lord Chief Baron says, that Lord Eldon came to the conclusion that there is not such a charge of interest in Bate as justified him in retaining the bill against him; and then the Lord Chief Baron adds, that if the bill had stated that the plaintiff in the action and Bate had agreed to divide the profits, or if it had stated that Bate had some such interest in the suit as identified him in interest with the plaintiff in the action, though not himself a plaintiff upon the record,—it says, my Lord Chief Baron
“ should have thought it probable, from Lord Eldon’s
“ judgment, that he would not have allowed the de-

“murrer.” Now, I say, there must have been some want of clearness in that report to have led the Lord Chief Baron to come to that conclusion, because, if Lord Eldon had examined the bill with that anxiety with which he usually did examine bills before him, he would have necessarily discovered that which appeared on this bill being examined by the Vice Chancellor with a view to another case, but again partly re-examined by him with a view to this case of *Irving v. Thompson*, to which his attention was more particularly called in consequence of this very case then pending for judgment. He examined this bill, and what did he find? He found those very things which were the points of difference, that had led the Lord Chief Baron to suppose that what existed in *Fenton v. Hughes* did not exist in that case; for he says, “I have examined the bill, and I find that it was charged that Bate was interested in the success of the action, and was to be entitled to all or some part of the money to be recovered thereby; and that he was or would be liable to pay all or some part of the costs in case Hughes should not recover, or that there had been some agreement, bargain, or understanding between Bate and Hughes and the attorney who carried on the action respecting the costs of such action, which was carried on at the risk and expense of Bate.” So that his honotr the Vice Chancellor might very well proceed to conclude that there were actually those very allegations in the bill which the Lord Chief Baron supposed if Lord Eldon had seen fit in *Fenton v. Hughes*, he would have come to a different conclusion from that which he adopted; and that, not-

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withstanding, seeing those very allegations, he came to the conclusion of allowing the demurrer.

LORD WYNFORD.—I am much obliged to my noble and learned friend for having stated this, but it does not show that Lord Eldon took notice of the circumstance that Bate was interested.

LORD BROUGHAM.—I only mean that it goes to show that *Fenton v. Hughes* was not decided on grounds other than those stated by the Vice Chancellor.

LORD LYNTHURST.—If the report is looked at, it will not be found inconsistent with that which is stated to be the effect of it. I have looked at *Fenton v. Hughes*, and it is not at all inconsistent.

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LORD CHANCELLOR.—The allegations in *Fenton v. Hughes* are as nearly as possible the allegations in this cause. They allege that Bate was the party really interested, that the person suing was not suing for his own benefit, and that the absent party Bate was so much interested in the result of the suit that he was to pay the costs. I say nothing about what may be the ultimate decree of the Court. My noble and learned friend seems to suppose that I apply the decision on this point to the facts of the case. Now, it is a rule in equity, that when a case comes on upon demurrer we must take the facts as stated for the purpose of the demurrer. We know nothing of the facts; it may be a mere fiction, a mere fable. It will lie upon the parties to prove these facts respecting Don Miguel or Donna Maria; we must take the facts as stated on the bill for the purpose of trying the demurrer, but for no other purpose. I do not mean to say that the facts may not

be those stated by my noble and learned friend, for we really have not the facts before us in any shape; we must try the demurrer upon the facts as alleged in the bill, without regard to any other point.

LORD WYNFORD.—I conceive the principle which the Courts have adopted is this, that the Court says, unless you condescend to answer the bill you shall not go on with the action.

LORD CHANCELLOR.—Then, again, my noble and learned friend has not distinguished very happily between bills for relief and bills for discovery, which is a very important distinction; this is a mere bill of discovery.

It is ordered, That the said order complained of in the said appeal be reversed; and that the demurrer to the plaintiff's bill in the Court below be allowed.

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[9th and 20th July 1840.]

(From the Court of Chancery in England.)

Sir FELIX BOOTH Baronet, WILLIAM MILLER, CHRISTY, WILLIAM CURLING, JOHN PETER DARTHEZ the younger, GEORGE HOLGATE FOSTER, WILLIAM ORMSBY GORE, WILLIAM HUGHES HUGHES, JOHN CHRISTOPHER LOCHNER, WILLIAM MITCALFE, AMBROSE MOORE, JOHN M'TAGGART, Sir FRANCIS PALGRAVE, THOMAS PHILLPOTTS, JOSHUA SCHOLEFIELD, GEORGE SCHOLEFIELD, WILLIAM SHADBOLT, THOMAS STOOKS, GEORGE TAYLER, WILLIAM VENABLES, and GEORGE POLLARD, Appellants.

THE GOVERNOR and COMPANY of the BANK OF ENGLAND, Respondents.

The London Joint Stock Bank, being a copartnership consisting of more than six persons, and carrying on the business of bankers in the city of London, agrees with a Canada bank to provide the necessary funds to pay at maturity all such bills as may be drawn by the Canada bank upon and accepted by George Pollard, manager of the London Joint Stock Bank, to a limited extent beyond the effects in their hands, and an agreement to that effect is signed by the trustees of the com-

pany. In pursuance of this agreement the president of the Canada bank, on behalf of such bank, draws a bill of exchange, payable to the order of Francis A. Harper sixty days after sight, for the sum of 1,000*L*, directed to George Pollard as manager of the London Joint Stock Bank, and accepted by him at the London Joint Stock Bank. Held, eleven of the judges being present and concurring, that, having regard to the acts in force respecting the Bank of England, the acceptance by Pollard under the above agreement was illegal; that his acceptance was equivalent to an acceptance by the Joint Stock Bank; that it was equally a violation of their privileges, whether the London Joint Stock Bank at the time of the acceptance had or had not funds in their hands on account of the bank in Canada, equal to the amount of the bill accepted; and that in either case an action on the case could be maintained by the Bank of England against the London Joint Stock Bank for a violation of the privileges conferred upon the Bank of England by the bank acts.

ON the 30th November 1837 the respondents, the Bank of England, filed their bill in the Court of Chancery against the appellants, whereby, after stating the several acts of parliament relating to the Bank of England, they stated, that in the year 1836 certain persons associated themselves together for the purpose of establishing a banking establishment in the city of London under the style or firm of "The London Joint Stock Bank," and that they issued the following prospectus:—"The London Joint Stock Bank, Princes Street, Mansion House. Capital three millions, in 60,000 shares of 50*L* each. Directors, Sir Felix Booth and others. Manager, George Pollard, esquire. The business of the bank is conducted on the follow-

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“ ing principles : accounts of parties, properly intro-
 “ duced, are received agreeably to the present custom
 “ of London bankers, with this advantage, that interest
 “ is allowed on current accounts and on deposits. On
 “ the first day of every month interest at the rate of
 “ 2½ per cent. per annum will be allowed on the smallest
 “ balance which may appear to the credit of each
 “ account at the close of any day during the preceding
 “ month. Sums of money received on deposit at such
 “ rate of interest and for such periods as may be agreed
 “ upon, reference being had to the state of the money
 “ market; and if required, bills or promissory notes, at
 “ not less than six months date, will be delivered to
 “ depositors in lieu of receipts for sums of not less than
 “ 100£. Interest at the rate of 2½ 10s. per cent. per
 “ annum allowed on sums not exceeding 2,000£. depo-
 “ sited without special agreement, which may be with-
 “ drawn at any time on giving ten days notice. The
 “ agency of joint stock and other country and foreign
 “ banks undertaken on such terms as may be agreed
 “ upon. Investments in and sales of all descriptions
 “ of British and foreign securities, bullion, specie, &c.
 “ effected, dividends received, and every other descrip-
 “ tion of banking business and money agency trans-
 “ acted. A bill committee of the directors sits daily,
 “ from 12 till 2 o'clock, to receive applications for
 “ discounts, which are considered confidential, and
 “ promptly decided upon. The board of directors
 “ meets weekly, when a full statement of the affairs
 “ of the bank is laid before them.”

That in the year 1836 such company or partner-
 ship was formed for the purpose of carrying on the

trade or business of banking in London, under the style or firm of "the London Joint Stock Bank," in Princes Street, in the city of London.

The bill then stated, that the plaintiffs had discovered that the object and design of the said company was not only to carry on the business of a bank of deposit and the issue of bills and promissory notes, as stated in their said prospectus, but to borrow, owe, and take up money on their bills or notes at a shorter date than six months from the issuing thereof.

That in the deed or agreement of copartnership of the said company, which was signed by each person who became a partner therein, there was contained a power to the directors, or some other officers of the said company or partnership, to authorize persons to sign bills or notes and other negotiable securities.

That the said London Joint Stock Bank Company so carrying on the said trade or business of banking, under the said style or firm of "the London Joint Stock Bank," at the formation of the said company established a house for the purpose of carrying on the said trade or business of banking in Princes Street, Mansion House, in the city of London; and the said company or partnership have, ever since the formation thereof, carried on the trade or business of banking at such place aforesaid, and now do carry on such trade or business there, and have ever since the formation thereof and now have the whole of their banking establishment in London: that the entire management of all the affairs and property of the said company or partnership was in the board of directors and manager.

That there was a banking establishment carrying on business at Kingston, Upper Canada, in North America,

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under the style of the Commercial Bank, Midland District: that previously to the month of May 1837, and subsequent thereto, the Commercial Bank, Midland District, issued bills of exchange and promissory notes for various sums of money payable on demand, or at less time than six months from the time of the acceptance thereof, and such notes and bills of exchange were by the Commercial Bank, Midland District, declared to be payable and were made payable by the London Joint Stock Bank.

That the said Commercial Bank, Midland District, had drawn divers bills of exchange and promissory notes, payable at a less time than six months from the time of the acceptance thereof, upon the said London Joint Stock Bank, for various sums of money, and which said promissory notes and bills of exchange had been accepted by the said London Joint Stock Bank.

That the Commercial Bank, Midland District, had drawn and negotiated such bills of exchange and promissory notes upon the said London Joint Stock Bank company or partnership, with a view to maintain a circulation of paper money for the benefit of the London Joint Stock Bank company; and that the London Joint Stock Bank received the profit made thereby, by arrangement and agreement between them and the said Commercial Bank, Midland District.

That the London Joint Stock Bank, on the 26th April 1837, authorized George Tayler to write to the plaintiffs the following letter:—

“ London Joint Stock Bank,
26th April 1837.

“ Gentlemen,

“ Having received from a transatlantic chartered
“ bank the offer of their agency, which would involve
“ the necessity of this bank accepting their drafts

“ payable at a shorter date than six months, the directors of this bank are desirous of knowing whether the directors of the Bank of England would interpose any difficulty in the way of this bank accepting such drafts.

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“ I have the honour to be,

“ Your very obedient servant,

“ GEORGE TAYLER,

“ To the Governor and Court of Directors
“ of the Bank of England.”

“ Chairman.”

That the plaintiffs, on the 27th day of April 1837, sent, by their secretary, to the said George Tayler, in reply, the following letter :—

“ Sir,

“ Bank of England,
27th April 1837.

“ I am desired to acknowledge the receipt of your letter of the 26th instant, addressed to the governor and court of directors of the Bank of England, in which you ask whether the directors of the bank of England will interpose any difficulty in the way of the London Joint Stock Bank accepting drafts payable at a shorter date than six months ; and in reply I have to state, that such acceptances would be an infraction of the privileges of the bank of England, and as respects the public would be illegal and void, and consequently could not be permitted by this corporation.

“ I have the honour to be, Sir,

“ Your most obedient servant,

“ To George Tayler, esquire,
“ chairman of the London
“ Joint Stock Bank.”

“ JOHN KNIGHT.”

That at the end of the month of September 1837 plaintiffs received certain remittances from North America, and amongst various bills of exchange, which

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formed part of such remittances, plaintiffs received a bill of exchange drawn by John S. Cartwright, who is president of the Commercial Bank, Midland District, on behalf of such last-mentioned bank, which bill of exchange was as follows :—" 1,000*l.* sterling. Kingston, " Upper Canada, 25th July 1837. Sixty days after " sight pay this my first of exchange, second and third " unpaid, to the order of F. A. Harper, cashier, the " sum of 1,000*l.* sterling, value received, which place " to account of the Commercial Bank, Midland District, " with or without further advice. John S. Cartwright, " president. To George Pollard, esquire, manager, " London Joint Stock Bank, London."

That plaintiffs, on the 2d of October 1837, duly presented the same at the office of the London Joint Stock Bank for acceptance, and the same was accepted by George Pollard, as the manager of the London Joint Stock Bank, on their behalf and for their benefit; and such acceptance was written upon the said bill of exchange, and was as follows :—" Accepted, 2d October 1837, at the London Joint Stock Bank, " Geo. Pollard."

That the said word "at," included in the said words " Accepted, 2d October 1837, at the London Joint " Stock Bank, Geo. Pollard," was fraudulently inserted for the purpose of defrauding the public and the plaintiffs; and that the said bill of exchange was really accepted by the London Joint Stock Bank, and the London Joint Stock Bank held themselves and their assets responsible and liable to pay the same.

That, after the said bill of exchange had been so accepted, plaintiffs caused it again to be taken to the office of the London Joint Stock Bank, and required

an acceptance in words according to the tenor of the bill of exchange; and in answer to such requisition, one of the clerks of the London Joint Stock Bank stated that the acceptance was sufficient, and that the London Joint Stock Bank were ready and willing to discount the bill.

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That on the 26th day of October 1837 plaintiffs caused their solicitors to write and send to the London Joint Stock Bank the following letter:—

“ Gentlemen,

26th October 1837.

“ The attention of the governor and directors of
“ the Bank of England has been drawn to bills of
“ exchange which have recently appeared drawn by
“ a bank in Upper Canada, for which it appears
“ you act as London agents, upon your manager,
“ and accepted at your office. The bank are advised
“ that the acceptance of such bills, having less than
“ six months to run, is a violation of their exclu-
“ sive privilege, and we request to know whether it is
“ intended to persist in the practice, as in that case we
“ are instructed to take immediate proceedings to
“ obtain an injunction from a court of equity.”

That the secretary to the London Joint Stock Bank by their direction, in answer to such last-mentioned letter, wrote and sent to plaintiffs solicitors, on the 2d November 1837, the following letter:—

“ London Joint Stock Bank,

“ Gentlemen,

2d November 1837.

“ Your letter of the 26th ult., addressed to the direc-
“ tors of this bank, was laid before the board yesterday,
“ and in reply thereto I am instructed to state, that the
“ directors deny that any practice has been adopted by
“ the London Joint Stock Bank which is a violation of

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“ the exclusive privilege of the bank of England, the
“ London Joint Stock Bank never having accepted, nor
“ directed nor authorized their manager or any other
“ person to accept, any bills of exchange having less
“ than six months to run.”

The bill amongst other things charged, that the directors had authorized George Pollard to accept bills of exchange and promissory notes drawn upon the Joint Stock Bank company, in the manner and form in which the said bill of exchange, dated the 25th day of July 1837, had been accepted by Pollard.

That the form of acceptance had been resorted to in consequence of the acts of parliament giving such privilege as aforesaid to the plaintiffs, and with the intent and for the purpose of evading, eluding, or avoiding the operation of the said acts.

The bill likewise charged, that George Pollard had no connexion with the Commercial Bank, Upper Canada, in his individual character, and had held no correspondence with the Commercial Bank, Upper Canada, except as manager, agent, or servant of the London Joint Stock Bank.

That all the bills of exchange accepted by George Pollard were debited in books of account against the London Joint Stock Bank, and that the said bills of exchange were paid out of monies belonging to the said London Joint Stock Bank.

And the bill prayed, that an account might be taken of all bills of exchange and promissory notes accepted or caused to be accepted, or authorized to be accepted by the said defendants for or on behalf of the company, or accepted or caused to be accepted by the said London Joint Stock Bank company, payable at a less

time than six months from the acceptance thereof, and particularly of all bills of exchange and promissory notes drawn upon the said London Joint Stock Bank, accepted by George Pollard or any agent of the London Joint Stock Bank, in the form in which the bill of exchange dated the 25th day of July 1837 was accepted, payable at less time than six months from the acceptance thereof, and of the gains and profits of the said London Joint Stock Bank made by accepting the same; and that they might pay the amount of such gains and profits to plaintiffs; and that it might be declared, that the accepting by George Pollard of the said bill of exchange, dated the 25th day of July 1837, was a fraud upon plaintiffs; and that the said defendants might be restrained, during the continuance of the privileges so granted to plaintiffs, from accepting or causing to be accepted, for or on behalf of the said London Joint Stock Bank, any bill of exchange or promissory note payable at less than six months from the acceptance thereof, and from accepting or causing to be accepted by George Pollard or any agent of theirs, in the form in which the said bill of exchange dated the 25th day of July 1837 was accepted, any bill of exchange or promissory note drawn upon the said London Joint Stock Bank, payable at less time than six months from the acceptance thereof; and that the defendant George Pollard, and every agent and servant of the London Joint Stock Bank, might in like manner be restrained from accepting any bill of exchange or promissory note in the form in which the said bill of exchange dated the 25th day of July 1837 was accepted, and that all the said defendants might in like manner be restrained from in any other manner borrowing, owing,

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or taking up in England, for and on behalf of the said London Joint Stock Bank company or partnership, any sum or sums of money on the bills or notes of the said London Joint Stock Bank company or partnership, payable on demand or at any less time than six months from the borrowing thereof; and that the said London Joint Stock Bank, and each and every partner therein or shareholder thereof, might in like manner be restrained from accepting or causing to be accepted, for and on behalf of the said London Joint Stock Bank, any such bill of exchange or promissory note as aforesaid, and from in any other manner borrowing, owing, and taking up in England, for and on the behalf of the said London Joint Stock Bank, any sum or sums of money on such bills or notes as aforesaid of the said London Joint Stock Bank.

The appellants, except George Pollard, were the directors of the London Joint Stock Bank. They filed a joint and several answer; and George Pollard, who was the manager, but not a director, partner, or shareholder, filed a separate answer.

By these answers it appeared that on the 21st November 1836 the London Joint Stock Bank commenced business, and a deed of copartnership was executed, dated the 31st day of October 1836, between some of the directors of the first part, and the other directors who were trustees of the second part, and the several other persons whose names and seals were or should be subscribed and affixed thereto of the third part; whereby it was provided, that the business of the company should at all times be under the control of nineteen directors being shareholders, and that they should have the entire management of the business of the company, and ma-

nagement and ordering of the capital and effects of the company, and the appointment and removal of every officer or servant of the company; and such person or persons as they should authorize should have the power to sign, draw, endorse, or accept all bills of exchange, promissory notes, and other negotiable securities; and the appointment of four or more persons to be trustees for the company, by whom all such contracts might be made as the directors might think fit, and all instruments might be made, on behalf of the company; and it was provided, that the directors might execute any power of attorney enabling any person to act on behalf of the company in any business or matter which should be stated in such power of attorney.

That at a board of directors, holden on the 19th of November 1836, the directors authorized Mr. George Pollard, manager of the bank, exclusively to endorse all such bills of exchange, promissory notes, and other negotiable securities, and to draw such checks, in the name or on account of the company or the trustees thereof, as might be necessary in the usual course of business.

In consequence of a letter received by Mr. Pollard, on the 22d of April 1837, from Mr. Harper, the cashier of the Commercial Bank of the Midland District, Upper Canada, to know upon what terms the London Joint Stock Bank would undertake their agency in London, and after the letter of the 27th April 1837, before stated, had been written by the bank of England, at a board holden on the 6th of May 1837 it was resolved, that a communication should be made to the Commercial Bank, Upper Canada, stating their readiness to accept

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their account, on condition that their drafts to the extent of 40,000*l.* on the manager of the London Joint Stock Bank be accepted by him in his individual capacity.

On the same day Pollard wrote a letter to Mr. Harper, stating that by the charter of the bank of England no joint stock bank could accept bills of exchange in London, or within sixty-five miles of it, at a less date than six months at least; but proposing, that, instead of their drawing bills requiring an acceptance, they should either issue promissory notes payable at the London Joint Stock Bank, or should draw upon him in the following form:—"To George Pollard, esquire, manager of the London Joint Stock Bank, London;" and that the due payment of his acceptances should be guaranteed by the London Joint Stock Bank.

On the 22d day of July 1837 George Pollard received from Harper a letter, dated Kingston, 21st June 1837, stating that the board of the Canada bank had taken into consideration both the modes proposed, so as not to come within the power of the act in favour of the Bank of England, and preferred that of drawing on Pollard as manager at sixty days sight, being the dates at which bills were commonly negotiated, and which the public would prefer; and desiring that a guarantee of the bank might be sent to protect the drafts of the president of the Canada bank. This letter was submitted to a board of directors of the London Joint Stock Bank, holden on the 26th day of July 1837, when it was resolved, that in conformity with the request of the Kingston Commercial Bank, of the Midland District, Upper Canada, a letter should be written to the president and directors of such bank, enclosing

two of the printed forms of agreement, signed by the trustees of this bank, with the following additional words:—"And that the said London Joint Stock Bank " will provide on your behalf the necessary funds to pay " at maturity all such bills as may be drawn by the said " bank upon and accepted by Mr. George Pollard, " manager of the said London Joint Stock Bank, such " bills being accepted by him in his individual capacity, " with a request that the president and directors will " return one of the said agreements, signed by them."

On the 29th day of July 1837 the directors of the London Joint Stock Bank, in pursuance of such resolution, caused their secretary to write to the president and directors of the Commercial Bank a letter approving of the mode of drawing, and enclosing agreements, one signed by the trustees of the London Joint Stock Bank, whereby they engaged that the capital stock and funds of the company should be liable for any balance that might become due to the Kingston Commercial Bank on their accounts with it, and that the London Joint Stock Bank would provide the necessary funds to pay at maturity all such bills as might be drawn by the Kingston bank upon and accepted by Mr. George Pollard, manager of the said London Joint Stock Bank; the other to be signed by the president of the Kingston bank, whereby the Kingston bank contracted to pay to the trustees of the London Joint Stock Bank on demand such sums of money as might at any time be due from them to the London Joint Stock Bank.

The president of the Commercial Bank drew the bill of exchange dated the 25th July 1837, which was accepted by Pollard in the way mentioned in the bill;

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and it was afterwards agreed between Pollard and Harper that the bills should be addressed "to George Pollard, esquire, at the London Joint Stock Bank, London," omitting the word "manager."

The appellants denied that they had authorized George Pollard to accept any bill of exchange drawn upon the London Joint Stock Bank, and George Pollard denied that he had accepted the same on their behalf, but that the same was accepted on behalf of himself and for the benefit of the Commercial Bank in Canada; and they denied that the assets of the Joint Stock Bank were liable for the payment thereof, but they admitted that the London Joint Stock Bank, in conformity with the arrangement entered into between them and the Kingston Commercial Bank, out of money belonging to the said Commercial Bank in the possession of the London Joint Stock Bank, or out of their own money, from time to time paid all the bills of exchange of the said Commercial Bank drawn upon and accepted by Pollard in the form following; that is to say, addressed sometimes "To George Pollard, esquire, manager of the London Joint Stock Bank, London," and at other times "To George Pollard, esquire, manager, London Joint Stock Bank, London;" and accepted at first, "Accepted (date) at the London Joint Stock Bank,—George Pollard," and subsequently, "Accepted (date), payable at the London Joint Stock Bank,—George Pollard;" and Pollard denied that the bills of exchange were entered in the books of the London Joint Stock Bank, but were entered in his own private book; but when paid, the amount of the payments was entered in the books of the London Joint Stock Bank.

On the coming in of the answers notice was given to

the appellants that a motion would be made before the Master of the Rolls to restrain the appellants, the directors of the London Joint Stock Bank, and their officers, from accepting or causing to be accepted bills of exchange or promissory notes payable at less than six months from the acceptance thereof.

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On the 5th day of May 1838 the motion came on to be heard before the Master of the Rolls, and on the 16th day of June an order was made, restraining the society or partnership called the London Joint Stock Bank, and every partner therein, and the appellant George Pollard, and every clerk, servant, or agent of the same partnership, from accepting or causing to be accepted in the name of the said partnership, or in the name of the said George Pollard or any other name, on behalf of the said partnership, in the course of their banking transactions, any bill or bills of exchange payable on demand or at any time less than six months from the acceptance thereof.

From the order of the 16th day of June 1838 the appellants appealed, and the appeal came on to be argued, the judges being present.

Mr. Kindersley for the Appellants.—The words upon which the question turns are the same in all the acts:—
“ That it shall not be lawful for any body politic other
“ than the Bank of England, or other persons united in
“ covenants or partnership exceeding the number of
“ six persons in England, to borrow, owe, or take up
“ any sum or sums of money on their bills or notes
“ payable on demand or at any less time than six
“ months from the borrowing thereof,” limited by the

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7th George the 4th, c. 46. to the distance of sixty-five miles from London. The object of this clause in the acts was not to prevent an individual but a number of persons issuing paper upon which they might be sued. The acts must be construed strictly, as being in restraint of trade. The word "owing" comes between "borrowing" and "taking up;" there must be an owing in the nature of a borrowing and taking up. If Pollard was alone liable upon the bill of exchange, how can it be said that it was the bill of the London Joint Stock Bank; they were liable upon their guarantee, but not upon their bill. *Thomas v. Bishop*¹, *Leadbitter v. Farrer*², *Emly v. Lye*³, *Jackson v. Hudson*.⁴

George Pollard was not authorized by the London Joint Stock Bank to accept bills on their behalf; it was his individual acceptance, and the acceptance of no other person.

Respondents
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Sir Frederick Pollock and Mr. Pemberton for the Respondents.—This case has been disposed of by Anderson and the bank of England. The Joint Stock Bank are the acceptors of this bill, and if an action were brought evidence might be adduced to show that it was an acceptance by the bank, by the means of their agent. The bank absolutely engages to pay the bills out of their own funds; it does not guarantee the payment, only in case of the death or bankruptcy of Pollard; and Pollard has no connexion with the Kingston bank except what arises from his being manager of the London Joint Stock Bank. From such a state of facts

¹ 2 Strange, 955.

² 15 East, 7.

³ 5 Maule and Selwyn, 345.

⁴ 2 Campbell, 447.

it would follow that this was a mode adopted by them of accepting bills through their agent George Pollard, and that was the name in which they chose to accept bills and carry on business. If, supposing the bank had drawn their bills in the name of John Stiles, and it could be shown that they were paid at and by the bank, can any body doubt that a jury would find that the bank would be liable? If an agent makes a contract in his own name for his principal, it is competent for a jury to find that the name was used on behalf of the principal, and make the principal liable upon the contract.

The Joint Stock Bank owes the money due upon the bill; it is equally a debt, though the day of payment is postponed. This bill has been accepted by Pollard with a view fraudulently to evade the law; and, with the exception of Scotch marriages, all acts done to evade a law are fraudulent. An attempt to evade the stamp laws by passing over to another country would be void. Though an action could not be maintained against the Joint Stock Bank upon their bill, yet they may be shown to have violated the privileges of the bank; *Collis v. Emett*¹, *Minet v. Gibson*², *Farlee v. Herring*³, *Wilson v. Barthrop*⁴, *Thomas v. Bishop*⁵, *Leadbitter v. Farrow*.⁶

It is said, will a court of equity interfere to prevent a violation of the stamp acts? No, any more than it will interfere to prevent smuggling, because it is not founded upon contract. This contract is founded upon valuable consideration—advances by the bank.

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¹ 1 H. Blackstone, 313.

³ 3 Bing. 625.

⁶ 2 Strange, 955.

² 3 Term Reports, 481.

⁴ 2 Meeson and Welsby, 863.

⁵ 5 Maule and Selwyn, 345.

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Sir William Follett in reply.—This judgment cannot be supported by the law of England. The Bank of England v. Anderson¹, decided, upon an inland bill, that it was a borrowing, owing, and taking up at interest of an inland bill. The judges confined themselves to the particular point decided by them, but declined to give an opinion whether more than six persons not in trade can accept a bill. This is the case of a foreign bill; the consequences of this judgment would be that more than six persons accepting a bill of exchange would violate the acts of parliament; *Harvey v. Kay*², *Bramah v. Roberts*.³

The East India Company has been in the habit of accepting bills of exchange at a less period than six months. The words of the act are, a borrowing, owing, and taking up money on their bills; there is no prohibition of their accepting bills of exchange. In every act bill of exchange is described as bill of exchange, and in no other terms.

The guarantee is not the guarantee of the company, but of six individuals, who cannot bind the company. The company is not liable to be sued upon it, but only the six individuals. The Joint Stock Bank is not liable to sue or be sued by their agent. Assuming that the Joint Stock Bank were liable upon the bill, it is not liable beyond its guarantee; but Pollard was liable upon the bill, and it is a settled principle of law that two persons cannot be liable. *Thomas v. Bishop* decides that the company is not liable. If it were necessary to inquire into the liability of parties, the negotiability of

¹ 2 Keen, 328.

² 9 B. and C. 363.

³ 9 Bingham, N. C. 963.

bills would be entirely destroyed. There cannot be two acceptors of a bill of exchange; there is a series of authorities to show that if persons are not parties to a bill they cannot be sued upon it; *Emly v. Lye*.

The Joint Stock Bank could only be liable upon the ground that the name of Pollard was their name of business. There cannot be two principal joint debtors; it is an engagement from Pollard to pay the bill, with a guarantee from the Joint Stock Bank. But does this Joint Stock Bank owe money on their bills? It is not a borrowing of money, but an actual advance by them, and it must be a borrowing, owing, and taking up in England.

At the time of the establishment of the bank by the statute of Anne bills of exchange were perfectly well-known. Foreign bills depend upon the general law of merchants; no act of parliament has altered or interfered with foreign bills; they stand upon the general commercial law of the world; they were negotiable and transferable, no others were negotiable. But banks were perfectly well known. The goldsmiths notes are acknowledgment on receipt of money; not transferable, but only payable to bearer. The 5th & 6th of William the Third enabled them to issue bills and notes. In all the acts there is a distinction between bills and bills of exchange.

The words of this statute do not apply to borrowing. When is the borrowing? Is it at the time Pollard accepts the bill? Suppose it is not accepted, is it a borrowing? No actual borrowing, no liability on the bill. Whether there is any owing depends upon circumstances. When do they owe? But then it is said that it is a fraudulent evasion of an act of parliament. Is there any such case

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as an evasion of an act of parliament? If it comes within the meaning of an act of parliament it is illegal; if otherwise, it is not. If a person goes abroad for the purpose of writing on unstamped paper, he may do it. A gift, with a power of revocation, for the purpose of evading the legacy duty, is good. A fraudulent preference is not an evasion of the act, but it is within its provisions. A person going to a foreign country to evade the laws of marriage may do it. Instead of having the advantage of the bank's acceptance, there is only the acceptance of Pollard. The public is not deceived; the object of the acts was to prevent a number of persons pledging their credit. There is no difference between a court of equity and a court of law in the construction of an act of parliament; if it is a violation of the law, it is a violation of the rules of equity; but not otherwise. The Master of the Rolls says that these bills must be considered their bills. How is it their bill? A foreign bill drawn by the Canada company. It is not issued on the credit of the Joint Stock Bank; no credit, but a foreign bank, and accepted by an individual. It is no part of the circulating medium of the country. It differs from the Bank of England v. Anderson in three particulars:—first, it is a foreign bill of exchange; second, accepted; third, there are funds in the hands of the bank to answer the demand.

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LORD CHANCELLOR.—If any doubt was entertained with respect to the accuracy of the decision in the case of the bank of England v. Anderson, this House would not proceed to adjudicate upon this case, assuming that to be the law; but this House would call upon the

learned counsel to argue the case upon that ground, in order that it might come to a conclusion whether that was an accurate decision or not, having the advantage of the assistance of the learned judges. But after examining that case, I certainly cannot bring myself to entertain any doubt with respect to the accuracy of the law there laid down, and I cannot conceive that the appellants have lost any thing by its being assumed, for the purpose of the argument, that that case was properly decided.

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Then, if we are to take that to be the law, the question is, how far the circumstances of this case create any distinction, so as to make the rule of law inapplicable to this case which was applied to the circumstances in the case of the bank of England v. Anderson? And in proposing the questions for the judges, your Lordships object will be so to put them as to draw from the learned judges an opinion, how far the difference of the circumstances in the two cases would affect the decision in point of law.

There are three circumstances relied upon as distinguishing this case from the case to which I have referred: the first is, that the bill of exchange that was accepted in that case was an inland bill of exchange, and in the present case it is a foreign bill of exchange. The next circumstance, and the most important one, no doubt, is the mode in which the acceptance was made, not being made by the company nor in the name of the company, but by George Pollard, under the circumstances that appear upon the face of these proceedings. And another circumstance is, that in the case of the bank of England v. Anderson it was a fact stated, that at the time the company accepted the bill they had

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funds in their hands equal to the amount for which the bill was accepted; whereas in this case the contract is not confined to the circumstance of the company in London having funds in hand, but it is part of the contract that they should accept bills, looking to the company in Canada remitting the money, though not in hand at the time, but in time to meet the acceptance when due. With regard to the first point I do not perceive how there can be any distinction between the two cases, arising from the circumstance of the bill being a foreign bill in the one case and an inland bill in the other. The object of the acts of parliament is to protect the bank of England; and what they had to guard against, and which they have endeavoured to guard against, is the credit attached to a paper circulation within certain limits, arising from the credit of more than six persons being associated together within those limits; and therefore the circumstance of a transaction within the prescribed limits, having its origin beyond the limits of this country, does not appear to me to affect this question.

The first question is, "The London Joint Stock Bank, under circumstances which would have made it illegal in them as a company, and a violation of the rights and privileges of the bank of England, to have accepted and issued the bills herein-after mentioned, if drawn upon them, enter into an agreement with a bank in Canada to procure bills, drawn by such bank upon George Pollard, the manager of the London Joint Stock Bank, to be accepted by the said George Pollard, and to provide funds for the due payment of such bills, the money transaction arising therefrom being, in the accounts between the two banks, to be

“ treated in all respects as transactions between the
 “ said two banks. Is the acceptance of such bills by
 “ the said George Pollard in execution of this agree-
 “ ment lawful, regard being had to the acts in force
 “ respecting the bank of England ?” That raises the
 question, how far the mode of acceptance excludes the
 transaction from the operation of those acts, or includes
 it within it.

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The next question will be, “ Would the acceptance
 “ of such bills be lawful, assuming that the London
 “ Joint Stock Bank, at the time of such acceptances,
 “ had funds in their hands on account of the bank in
 “ Canada, equal to the amount of the bills so ac-
 “ cepted ?”

The third question is to meet the case of their not
 having such funds; “ Would the acceptance of such
 “ bills be lawful, assuming that the London Joint Stock
 “ Bank had not at the time of such acceptances any
 “ funds in hand belonging to the bank in Canada, but
 “ that such bills were accepted upon the credit of a
 “ contract by such bank to remit sufficient funds to the
 “ London Joint Stock Bank, to meet such acceptances
 “ before the time at which the bills would become
 “ payable ?”

There is another mode in which this question might
 be tried, namely, Whether the transactions that took
 place would or would not have entitled the bank of
 England to have brought an action against the London
 Joint Stock Bank, for a violation of the privileges which
 the acts of parliament are supposed to confer upon
 them? Another question, also, which might be raised,
 and upon which we should have the opinion of the
 learned judges, is, whether what has taken place is such

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a violation of the acts of parliament as would subject the parties to a prosecution by way of indictment? To meet those points I propose to submit to the learned judges a fourth question in these words: "Could the bank of England maintain any action against the London Joint Stock Bank founded upon such transactions, or would any of the parties therein be liable to be personally proceeded against by way of indictment under either of the states of circumstances above supposed?" That last question, which applies to the action and prosecution, merely states the same proposition in two ways; it would be better to confine the last question to the liability of the parties to an action.

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LORD CHIEF JUSTICE TINDAL. — My Lords, the facts stated by your Lordships as the ground-work of the questions proposed to Her Majesty's judges are these:—

The London Joint Stock Bank, under circumstances which would have made it illegal in them as a company, and a violation of the rights and privileges of the bank of England, to have accepted and issued the bills hereinafter mentioned, if drawn upon them, enter into an agreement with a bank in Canada to procure bills, drawn by such bank upon George Pollard, the manager of the London Joint Stock Bank, to be accepted by the said George Pollard, and to provide funds for the due payment of such bills, the money transactions arising therefrom, being in the accounts between the two banks, to be treated in all respects as transactions between the said two banks; and the first question proposed by your

Lordships on this state of facts is, whether the acceptance of such bills by the said George Pollard in execution of this agreement is lawful, regard being had to the acts in force respecting the bank of England? In answer to that question I beg to state to your Lordships that it is the unanimous opinion of those judges who heard this case discussed at the bar of your Lordships House¹, that, assuming, according to the terms of that question, that the acceptance of such bills by the London Joint Stock Bank, if drawn directly on that company, would have been illegal and a violation of the rights and privileges of the bank of England, it appears to us to be a necessary consequence that the procurement by the London bank that bills drawn upon George Pollard, their manager, shall be accepted by the said George Pollard, under the agreement above stated for the providing of funds for the due payment of such bills, must equally be a violation of the rights and privileges of the bank of England, upon the principle that whatever is prohibited by law to be done directly cannot legally be effected by an indirect and circuitous contrivance.

The exclusive privileges conferred on the bank of England by parliament are founded on a contract between that body and the public. For the original grant, and also for the renewal and confirmation of such privileges, the bank of England has from time to time paid very large sums of money to the public, and no member of that public can justify either doing or procuring to be done any act which, for the protection of

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¹ Tindal, C. J. ; Littledale, J. ; Parke, B. ; Bosanquet, J. ; Patteson, J. ; Gurney, B. ; Williams, J. ; Coleridge, J. ; Coltman, J. ; Maule, J. ; Rolfe, B.

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such rights and privileges, has been forbidden by law. Now it is impossible not to see that the substantial parties to the transaction stated by your Lordships are the Canada bank and the London Joint Stock Bank, and that the manager of the London bank who lends his name is a mere nominal acceptor, whose name is used to cover the real transaction. It is the London bank, not the manager, who is to pay the bill, and the Canada bank engages to remit funds for that purpose before the bill becomes due. By means of this transaction the London bank takes upon itself the duty of an acceptor, that is, to pay the bill, not in default of the nominal acceptor, but in the first instance, in consideration of an arrangement that funds shall be remitted by the Canada bank (the drawers) for that purpose to them, the London bank. The plain object and intent of the various statutes which have been passed for the protection of the bank of England is, that the funds of a joint stock banking company shall not be pledged for the payment of a bill issued within a limited distance from London, and having less than six months to run. Such a pledge given by the acceptance of a bill by such a company has already been decided, by the case of the bank of England v. Anderson, to be a violation of the rights and privileges of the bank of England. But if the bill be accepted by a servant or nominee of the banking company, and they contract with the drawer that they, the company, will pay it, their funds are bound for the payment; the bill is circulated upon their credit, not upon that of their servant or nominee, for it is impossible to suppose for a moment that bills accepted in such form and under such circumstances can be circulated in London upon the individual credit of the

nominal acceptor, or upon any other credit than that of the banking company, by whose procurement and direction and for whose benefit the acceptance is really given.

The consequence of such a transaction is, that a competition is necessarily created between a paper currency circulating upon the credit of the banking company and the paper issued by the bank of England, which is the very mischief intended to be prevented, for it is obvious that if the transaction is legal with respect to a bill at less than six months, it is equally so with respect to a bill at six days, or even at a shorter period. It is contended, on the part of the London Joint Stock Bank, that they are authorized to take any course with impunity which does not fall directly within the precise terms and letter of the prohibitory clauses, contained in the several acts which secure the privileges of the bank of England. It is to be recollected, however, that the clauses protecting those privileges are not merely prohibitory laws. The privilege granted to the bank of England by parliament is a positive right, conferred upon that body for a valuable consideration, which the law will no more permit to be infringed by third persons without responsibility than it will a monopoly, granted by letters patent under the statute of James the First. If, therefore, the acceptance of a bill by the London bank would be an infringement of such privilege, it cannot be less an infringement, if attended with the same injurious consequences to the bank of England, to procure another person to accept the bill for the benefit of the London bank, though such acceptance be made in the name of their appointed nominee, whom they are bound to indemnify.

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The second question proposed by your Lordships upon the above statement of facts is this, Whether the acceptance of such bills would be lawful, assuming that the London Joint Stock Bank at the time of such acceptances had funds in their hands on account of the bank in Canada equal to the amount of the bills so accepted?

And if the answer given to the first question be correct, the acceptance by a person procured for that purpose by the London Joint Stock Bank must be considered in the same light as if the acceptance had been made by the banking company in its own name; and if that be so, the answer to the second question will be found in the opinion given by the Court of Common Pleas to the Master of the Rolls, upon a case stated to that Court, and confirmed by that noble and learned judge, in the case of the bank of England v. Anderson. The opinion of the Court of Common Pleas upon this point was thus expressed:—"The relation of "debtor and creditor, created by the acceptance of the "bill, appears to be considered by the legislature as "equivalent to the actual borrowing of the money, owed "on the one hand and credited on the other." And the Master of the Rolls, when reviewing the opinion of the Court of Common Pleas, says, "From the time of "borrowing means from the time of owing the money "on the bills or notes referred to, or, in the case now "under consideration, from the time of the acceptance." This case of the bank of England v. Anderson was very fully argued, and was much considered both in the court of law and in the court of equity. From the latter court an appeal might have been made to your Lordships House; such an appeal, indeed, is said to

have been at first made, but afterwards abandoned, and the decision of the courts of law and equity was thereby acquiesced in. The authority of this case was not disputed in the argument at your Lordships bar upon the present occasion, and we see no reason to doubt the propriety of the opinions therein expressed.

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The third question proposed is this: Would the acceptance of such bills be lawful, assuming that the London Joint Stock Bank had not at the time of such acceptances any funds in hand belonging to the bank in Canada, but that such bills were accepted on the credit of a contract by such bank to remit sufficient funds to the London Joint Stock Bank to meet such acceptances before the time at which the bills would become payable? And, notwithstanding the difference in the state of facts adverted to in this question, it appears to us, that the answer we must give to it is the same as that which we have already given to the second question.

If a bill be accepted upon the undertaking of the drawer to supply funds for the payment of it, a mutual contract of lending on the one hand and borrowing on the other is thereby created; and, although the drawer may not fulfil his engagement by actually remitting the amount agreed upon before the acceptance, or even before the day on which the bill becomes due, the transaction is not the less a transaction of lending and borrowing to the amount of the money represented by the bill; which transaction takes effect as "a borrowing upon the bill" as soon as the bill is accepted. If, therefore, the bill be drawn, under such an engagement as above mentioned, at less than six months from the date, it must necessarily be considered as a bill pay-

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able at less than six months from the borrowing of the money.

It is manifest that the introduction into the acts of the word "borrowing" instead of "date," to express the time of the currency of the bill, was only resorted to for the purpose of preventing the issue of bills appearing to be drawn at longer periods than six months from the date, but in fact issued at periods when the bill would fall due within a shorter time than six months from the issuing of them; and it is to be observed that bills or notes payable on demand are prohibited absolutely, without reference to any transaction of borrowing, upon which they may have been issued. The word "borrowing" is only employed with respect to bills and notes payable at a future time, in order to designate the period from which the six months are to be reckoned. A "borrowing" is assumed to exist as soon as the banking company begins to owe the money specified in the bill or note, that is, as soon as the acceptance or the note is put in circulation; and the expression "borrowing" is not used as descriptive of the consideration upon which the debt contracted by the bill or note is founded, but to denote the time from which the six months are to begin to run.

The last question proposed to us is this: Could the bank of England maintain any action against the London Joint Stock Bank, founded upon such transactions under either of the states of circumstances above supposed? And, in answer to this question, we are of opinion that an action might be maintained in either case.

It has already been observed, in answer to your Lordships first question, that the exclusive privilege

secured to the bank of England by parliament is in the nature of a right, granted to them by contract for valuable consideration. In the possession of such right they are entitled to be protected, and any infringement of such right is a private injury to that body, for which they are enabled to seek redress by action at law. Whether the right so granted be directly assailed by an act of the London bank in its own name, or through the medium and intervention of another person acting at their request, and by their procurement and for their benefit,—if they do or cause to be done in effect (though under cover of doing something different) that which is forbidden to be done by the acts passed for the purpose of securing to the bank of England the rights which they have contracted for, such banking company is, in our opinion, liable to be sued in an action on the case for an infringement of those rights.

In actions for the infringement of patent rights, it is of constant recurrence that the gravamen is laid, not as a direct infringement, but as something amounting to a colorable evasion of the right secured to the party; and we think that the acts of the London Joint Stock Bank, described in the foregoing questions put by your Lordships, do amount to an infringement of the rights and privileges of the bank of England.

LORD CHANCELLOR.—The magnitude of the interests which are involved in the appeal, upon which the Lord Chief Justice has given your Lordships the benefit of the unanimous opinion of the learned judges, is such that I cannot regret that we have had the opinion of the learned judges, although it did not appear to me, on the argument, that any difficulty likely to arise

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would have made it necessary to have taken the opinion of the learned judges, assuming that the law, as laid down in the bank of England v. Anderson, is good law, as to which no reasonable doubt can be entertained, and as to which I am very glad to find that the Lord Chief Justice has taken the opportunity of stating the opinion of the learned judges. There really can be no doubt as to the proper decision of the present question, because, if these rights do belong to the bank, established as they are, and as they are asserted in the case of the bank of England v. Anderson, it is quite impossible that those rights should be permitted to be destroyed by the arrangement which was resorted to in the present case. That appears to be the ground upon which the learned judges have come to the opinion of which they have now given your Lordships the benefit. It is an opinion I entertained from the commencement of the argument, and under those circumstances I move your Lordships, that the order of the Court below be affirmed, with costs.

Ld. Brougham's
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LORD BROUGHAM.—I entirely agree in opinion on this case with my noble and learned friend; indeed, I must say, as he has stated, that I never have entertained any doubt at all upon this case; and more especially when it is placed upon the footing on which it is here put, that of adopting the case of the bank of England v. Anderson, and applying the principle laid down in that case to the facts of this case; and the facts in this case do not appear to me, any more than to my noble and learned friend or the learned judges, to be different. We must in future consider that the bank of England v. Anderson, though originally a decision of only one

court, has now received the sanction of all the learned judges, of whose assistance your Lordships have had the benefit in this case ; and the affirmance of the judgment in this case is in fact an affirmance of the judgment in the bank of England v. Anderson, for the case stands on precisely the same principle.

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Petition and appeal dismissed, and the order therein complained of affirmed, with costs.

[*20th July 1840.*]

(From the Court of Chancery, Ireland.)

ROBERT SIMPSON, Appellant.

JAMES O'SULLIVAN, HONORA O'SULLIVAN, and JOHN
KEANE, Respondents.

By marriage settlement leasehold property is conveyed to trustees, to the use of James O'Sullivan for life, and after his death, to pay 100*l.* a year, by way of jointure, to his wife for her life; and subject thereto, to the use of the heirs male of their bodies; with liberty for J. O'Sullivan to raise by deed, mortgage, or other writing 1,000*l.*, to be applied to any purpose he should please; but not to be raised by sale of the property. J. O'Sullivan mortgages his interest in the leasehold property and the 1,000*l.* for securing a debt, and becomes bankrupt. The bankrupt's interest therein being sold upon the death of the bankrupt, the purchaser files a bill against the quasi tenant in tail, the widow of the bankrupt, and the surviving trustee of the settlement, in whom the legal estate is vested, for the purpose of raising the sum of 1,000*l.* by sale of the leasehold property. Held, that an inquiry, directed upon the hearing of the cause, as to what was the annual value of the property and the value of the life interest of the bankrupt therein at the time of the sale, was an immaterial inquiry, and had no reference to what was to be adjudicated between the parties to the cause.

Semle, that the 1,000*l.* is a prior charge to the jointure of 100*l.* per annum.

JAMES O'Sullivan the elder was possessed of all that part of the lands called the island or bog of Monamucky, otherwise Labonamucky, with its appurtenances, for a term of 999 years, by virtue of a certain indenture of lease of the 29th April 1795; and having built several houses on part thereof, on the 10th of May 1805 demised unto Jonathan Smith and Joshua Smith, both of the city of Limerick, a certain part of the said lands and tenements; viz., all that piece or plot of building ground in and connected with New Clare Street, set out and described in a map annexed to the said lease, being part of the said bog of Monamucky, otherwise Labonamucky, for a term of 889 years, reserving thereout a yearly profit rent of 317*l.* 8*s.* sterling, to be paid half-yearly.

By indenture dated the 25th January 1808 between the said James O'Sullivan of the first part, James O'Sullivan the younger, second son of the said James O'Sullivan the elder, of the second part, the said respondent John Keane, and William Ferguson, of the third part, and the said respondent Honora O'Sullivan, then Honora Keane, of the fourth part, being the settlement executed previously to and in contemplation of a marriage, which was afterwards had and solemnized between James O'Sullivan, junior, with Honora Keane, James O'Sullivan the elder conveyed unto the said John Keane and William Ferguson, their executors, administrators, and assigns, all that piece or plot of building ground so demised to the said Jonathan and Joshua Smith by the said James O'Sullivan, and also one of the houses in Clare Street in the said city of Limerick, built by the said James, viz., the house next Mrs. Gavin's, and then lately occupied by Mrs. Dwyer,

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discharged from all rents, taxes, and charges whatsoever, save window and hearth tax for the said house, to hold the said several premises to James O'Sullivan the younger for life, and from and after his decease, upon trust, to pay 100*l.* sterling per annum to Honora, his said intended wife, and her assigns, for life, for her jointure, and subject thereto, to the use of the heirs male of the body of the said Honora by the said James her intended husband lawfully to be begotten, and for want of issue lawfully to be begotten between the said Honora and the said James, to the use and behoof of the said James O'Sullivan the younger, as his absolute profit; and it was by the said indenture of settlement covenanted by and between the said several parties thereto, that James O'Sullivan the younger should be at liberty to raise, by deed, mortgage, or by any other writing, a sum of 1,000*l.*, to be applied to any purpose James O'Sullivan the younger should please, but that the same was not to be raised by way of the sale of the said lands, tenements, and hereditaments aforesaid.

That the said Jonathan Smith and Joshua Smith having suffered a considerable arrear of rent, reserved by the said lease of the 10th of May 1805, to accrue due, an ejectment for nonpayment of rent was, some time in the year 1809, brought against them by James O'Sullivan the younger and the trustees named in the said marriage settlement, who obtained judgment in the said ejectment suit, and the possession of the premises demised by the said lease was recovered under a writ of habere, which issued thereon.

By indenture of mortgage, dated the 24th day of January 1811, made between the said James O'Sullivan the younger, of the one part, and Quintin Hamilton, of

the other part, James O'Sullivan the younger assigned the estate comprised in the settlement, and appointed the sum of 1,000*l.*, which he was thereby empowered to raise, to Quintin Hamilton, for securing the sum of 1,500*l.* lent to him by the house of Hamilton, Crowden, and Co., together with interest and costs, as therein mentioned, subject to a proviso that when the debt of 1,500*l.*, with interest and costs, should be discharged, that then the said deed of mortgage should become void.

On or about the 1st of February 1817 a commission of bankruptcy was awarded and issued against James O'Sullivan the younger, who was thereunder duly found and declared a bankrupt; and Henry O'Sullivan of the city of Limerick, merchant, having been duly elected sole assignee of the estate and effects of the bankrupt, such estate and effects were accordingly duly conveyed and assigned to and vested in Henry O'Sullivan, as sole assignee under the commission.

On the 27th April 1818, under an order of the Court of Chancery, the bankrupt's estate in the premises comprised in the settlement, and his interest in the sum of 1,000*l.*, were sold by auction to the appellant for 850*l.*; and by indenture of assignment of the 7th of October 1818, in consideration of 850*l.* paid by the appellant to Quintin Hamilton, in part discharge of 967*l.* 19*s.* 10*d.* then due on his mortgage, were conveyed by Henry O'Sullivan and Quintin Hamilton to the appellant, his executors, administrators, and assigns, discharged, as to the 1,000*l.*, from all equity of redemption. The equitable interest in the premises only passed under this conveyance, the legal estate therein being in the respondent John Keane, who was the surviving trustee under

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clear that the defendant in this case can have nothing to do with any question as to the price paid, as between the vendor and the person who has purchased this property.

The tenant for life of the property in question had the power of raising 1,000*l.*; he did so, and became bankrupt; and the party now plaintiff claims, under an assignment of 1818, the benefit of that mortgage of 1,000*l.* and the estate for life of the bankrupt, and, therefore, became entitled by his purchase to the estate for life of the bankrupt, and to whatever interest the bankrupt had created under this charge of 1,000*l.*, which was to be enjoyed by any body who had made it the subject of purchase, and which enjoyment he had a right to enforce against any subsequent charge. And whether he gave too little, or whether he gave too much, for the purchase of that 1,000*l.*, is a matter of perfect indifference to the party who represents the inheritance. He is not a person who can be prejudiced by his having given an inadequate sum for it, or purchased it under circumstances which would entitle a party really interested in that question to set it aside. The defendant has no right to come before the Court for any such purpose; and why should he? What does it signify whether the assignee of the bankrupt has any thing to say against that transaction? So long as it remains unimpeached, the plaintiff is entitled to all the advantages which can be derived from that purchase. The plaintiff, therefore, having become entitled to whatever belonged to the tenant for life, there cannot be a question that he is entitled to recover it in respect of this purchase, whatever objections may exist, though not proved, against the original transaction of 1818.

It remains, therefore, to be considered what title the plaintiff acquired to that 1,000*l*.? The settlement, certainly, is very inartificially framed, but I cannot conceive that there can be a doubt as to his having acquired an interest in that 1,000*l*., the power of creating which was, under the settlement, incident to the tenant for life, as appears from passages to be found in different parts of the deed. It is incident to the tenant for life, because it was a power to be executed by the tenant for life. He was tenant for life, with the power of raising by mortgage the sum of 1,000*l*. out of the estate; and I do not see any ground on which it can be said that this was intended to be a restricted power, as the provision is, that he shall be at liberty to raise by deed, mortgage, or by any other writing the sum of 1,000*l*., to be applied to any purposes he shall please. This power to raise by mortgage 1,000*l*., to be applied to any purposes he might please, was in addition to the value of the life estate he acquired. The jointure, of course, would come into operation only after the expiration of the life estate. It is not to be supposed, that if he had raised the 1,000*l*. the mortgagee was to be deprived of his interest, if the estate produced enough to raise that interest and also the 1,000*l*. It is not consistent with the practice of your Lordships House to declare so much as to give an opinion beyond the immediate question, but as the question has been somewhat raised, I will say that I do not feel any doubt that the 1,000*l*., when raised, was to be a charge upon the estate from the period when it was raised, the interest to be paid by the tenant for life, and the party who lent the money to be the first person who had a charge upon the estate after the expiration of the tenancy for life.

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The Court below, under some misapprehension, probably, of the relative situation of these parties and their respective rights, has declined to make a decree for raising that 1,000*l*. from the produce of the estate, and has directed an inquiry and report "what was the annual value of the land, tenements, and hereditaments comprised in and conveyed to the appellant by the deed of assignment dated 7th October 1818, at the time of the sale thereof to the appellant, and what was the value at such time of the life interest of the said James O'Sullivan, the bankrupt, therein at the time of such sale, having regard to the situation thereof at that time with respect to the deeds of the 25th day of January 1808 and 24th January 1811." Now, it is obvious that the effect of that is, that it has no reference to what is to be adjudicated between the plaintiff and the defendant, and that whatever might be the result of that inquiry—whatever the Court might do upon it, it left the question between the plaintiff and the defendant where it was. That must have arisen from some misapprehension as to the situation in which those parties stood with regard to each other. It is clear, therefore, that that decree must be reversed. Your Lordships have before you a case in which the Court below, from a misapprehension of the course to be pursued, has directed an inquiry which does not touch any questions existing between the parties. It is the duty of this House, therefore, to remove that impediment by an assertion of the plaintiff's rights, and I apprehend that your Lordships, seeing that no decree has been made by the Court such as ought to have been made,—that the real question has not been entertained by the Court, in consequence of this mistake, the course

will be to declare the right, and then to leave the mode in which that right is to be enforced to the judgment of the Court below. I apprehend the order of the House, consistently with the practice, will be, to reverse the decree below, and to declare that the plaintiff is entitled, by virtue of the assignment of the 7th of October 1818, to the benefit of the charge created by the deed of the 24th of January 1811, and with this declaration to remit the cause, leaving to the Court below to make such decree as may be just and consistent with that declaration. That declaration will establish the plaintiff's title to the charge; the mode in which it is to be raised and the detail will be to be considered by the Court below, having the benefit of your Lordships declaration as to the plaintiff's right, leaving the question open as to other matters. I do not know very well how that question with regard to the jointure could be declared; at the same time I have not much doubt about it; it is raised in the pleadings by the answer. Perhaps it might save the possibility of another appeal to declare the title, but there is a difficulty in doing it.

It is ordered, that the said decretal order, complained of in the said appeal, be reversed; and it is declared, that the plaintiff in the Court below became entitled, by virtue of the assignment of the 7th of October 1818, to the sum of 1,000*l.* under the deed of the 24th of January 1811, in addition to the life interest of the bankrupt, James O'Sullivan.

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[*4th July 1839 and 28th July 1840.*]

(On a Writ of Error from the Court of Exchequer Chamber.)

LAWRENCE GWYNNE, Esquire, Plaintiff in Error.

JOHN BURNELL and JOSEPH MERCERON, Esquires,
(Survivors of JAMES COLLINS, Esquire, deceased,) Defendants in Error.

Payment of money received by a collector for a given year to the account of a former year, is a breach of the condition of a bond for due payment. It is not competent for a court of error to award a repleader.

To an action on a bond by the commissioners of taxes against the sureties, the defendant by plea states, that the collector had lands and goods of which the plaintiffs had notice: the replication asserts that he had no lands and goods of which they had notice; and the rejoinder asserts that the collector had lands and goods which might have been sold, but omits to put in issue that the commissioners had notice; whereupon issue is joined. The jury having found that the collector had lands and goods,—Held, that the issue being found for the defendant, he was entitled to a verdict, but not to judgment, inasmuch as the issue, if it were any issue at all, was immaterial or insufficient; and that judgment could not be entered for the plaintiff non obstante veredicto, as the rejoinder could not be taken to be an implied confession that the commissioners

had no notice; and the plea, if true, would form a good defence to the action. Nor, taking into consideration the other pleas, could judgment be entered up for the plaintiff on the whole record, as the plea, that the collector had lands of which the commissioners had notice, not being put in issue by the pleadings nor disproved, remains a good bar to the action.

THE plaintiff in error, together with Richard Bigg, a collector of assessed taxes for the year 1828 ending the 5th April 1829, and Samuel Cordozo entered into a bond, dated the 27th day of August 1828, with the defendants and James Collins, deceased, as commissioners under the land tax and assessed taxes act, in the penal sum of 4,048*l*. The condition of the bond (amongst other things) was, that the said Richard Bigg should well and truly pay or cause to be paid unto the receiver general of the said taxes, rates, and duties for the county of Middlesex all such sum and sums of money as should come to his hands as such collector upon the days and at the times by the said acts appointed for the payment thereof, and according to the true intent and meaning of the said acts.

To an action brought on the bond by the commissioners against the sureties the defendants pleaded various pleas, but the only material plea was the second plea, which was a plea of general performance, on which the plaintiffs in their replication assigned, for one of their breaches, that Bigg had not paid over to the receiver general the monies received by him as collector of the taxes, in respect of the rates and assessments mentioned in the condition for the year 1828-29, and the fifth plea, and the pleadings arising thereon.

The fifth plea stated, that Bigg had lands and goods

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within the jurisdiction of the commissioners, of which they had notice, which might have been seized and sold, but which continued unsold. To this plea plaintiffs replied, that Bigg had no lands within the jurisdiction of the commissioners which they could seize and sell, of which they had notice, and that all the goods and chattels of Bigg within their jurisdiction, of which they had notice, were seized and sold, and applied towards the satisfaction of the sums collected, but that the same were insufficient to satisfy Bigg's deficiencies, and that there were not any other goods and chattels of Bigg, of which they had notice. To this replication the plaintiff in error rejoined, that Bigg had divers lands and goods within the jurisdiction of the commissioners, which might and ought to have been discovered and found, but which were not seized and sold, and tendered an issue thereon, in which defendants in error joined.

The action came on for trial at the Guildhall of the city of London, before Alderson J., when the jury found that Richard Bigg paid over to the receiver general all the sums received by him for the assessments for the year 1828-29, but that he did not pay all those sums to the service of that year, the sum of 2,430*l.* having been paid to the service of that year, and 693*l.* to that of former years: that Richard Bigg had lands or houses, after the default, of the value of 121*l.*, which could have been seized or sold, and that he had goods, in like manner, of the value of 200*l.*, at the time of default, which could have been seized and sold: that the commissioners had not notice of the possession of houses or lands on the part of Richard Bigg, but that they had reasonable grounds for believing that he possessed household goods at the time of the default.

On the 17th January 1833 the Court of Common Pleas decided, that the payment by Bigg of all the sums received by him for assessments for the year 1828-29, not to the service of that year, but to that of former years, was a breach of the condition of the bond; and that the sale of the collector's lands and goods did not form a condition precedent to the right to put the bond in suit against the surety, where the commissioners had no knowledge of their existence before the action was brought, 9 Bingham, 544. The special case being turned into a special verdict was brought before the Court of Exchequer Chamber on a writ of error, when the judgment of the Court of Common Pleas was affirmed; Lord Denman and Williams, J., being of opinion, that the sale of the property of the collector was a condition precedent to an action being brought by the commissioners against the surety; Littledale, J., Bolland, B., and Patteson, J., being of opinion, that a sale of the property of the collector *known* to the commissioners was a condition precedent to bringing such action; Lord Abinger and Parke, B., being of opinion, that a sale was not a condition precedent to bringing such action, even though the commissioners *had notice* of such property; see Bingham's N. C. p. 7.

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To reverse this judgment the present plaintiff brought a writ of error in parliament.

On the 27th and 28th of June 1837 this case was argued, the judges being present¹; Sir William Follett for the

¹ The judges present were, Littledale, J.; Parke, B.; Vaughan, J.; Bosanquet, J.; Patteson, J.; Gurney, B.; Williams, J.; Coleridge, J.; Coltman, J.

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plaintiff in error and Serjeant Taddy for the defendants in error, when the following questions were put to the judges:—

A bond is given by the defendant as surety for A. B., a collector of assessed taxes for the parish of D., in the county of E., for the year 1828, to the commissioners of the assessed taxes, with a condition to the following effect:—“ That if the above-bounden A. B. do and
“ shall well and faithfully demand and collect all and
“ every the sum and sums of money, in the said assess-
“ ments charged and specified, of the respective persons
“ from whom the same shall or may be payable, and
“ shall and do, in case of nonpayment thereof, duly
“ enforce the powers of the said acts against such per-
“ sons who may make default therein; and also well
“ and truly pay or cause to be paid unto the receiver
“ general of the said taxes, rates, and duties for the
“ said county of Middlesex all such sum and sums of
“ money as shall come to the hands of the said A. B. as
“ such collector, upon the days and at the times by the
“ said acts appointed for the payment thereof, and
“ according to the true intent and meaning of the said
“ acts; and also do and shall, when thereunto required,
“ at such times and places as shall be appointed for
“ that purpose, give and render or cause to be given
“ and rendered, unto the commissioners appointed or to
“ be appointed to put the said acts in execution, or
“ to any two of them, a just and true account in
“ writing of all such sum and sums of money which
“ he the said A. B. shall have collected and received
“ by virtue or on account of the said assessments,
“ and shall forthwith pay and deliver the same

“ unto the said commissioners, or any two of them,
 “ or unto such person or persons whom they or
 “ any two or more shall appoint, then this obligation
 “ to be void, or else to remain in full force and
 “ effect.”

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A. B. paid to the receiver general of the taxes for the said county all the sums of money collected and received by him, and which came to his hands as collector, for the year 1828, at the proper days and times mentioned in the condition, and appointed by the acts of parliament the (43 George 3d. c. 99. and 3 George 4th. c. 88.) for payment thereof (see special verdict); but he did not pay all those sums to the account or service of that year, but a part only, and the residue he paid to the account or service of former years for which he had been collector, (but the defendant not having been surety for the said A. B. for the former years,) and by such payment the account of former years was paid up and satisfied. Was this conduct of A. B. a breach of the condition of the bond?

2dly, A. B. had, after the time of such breach (supposing that a breach took place), certain lands and goods in the district and within the jurisdiction of the said commission, of which the commissioners had knowledge before an action was brought on the bond. An action being brought, is it a defence to that action that the commissioners did not, before suit, seize and sell the said lands and goods?

3dly, Is it a defence to such action that the commissioners did not seize and sell, supposing that the commissioners had no knowledge, before the commence-

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ment of the suit, of the existence of such lands or goods?

4thly, To an action on such a bond by the commissioners a plea was pleaded similar to the fifth plea, to which there was a replication and rejoinder similar to those to that plea; the jury found that there were lands and goods of A. B. within the jurisdiction after the default, and before the commencement of the suit, but that the commissioners had not notice thereof. Ought the issue raised by the rejoinder to be found for the plaintiff or the defendant?

5thly, Supposing the verdict be entered for the defendant on the said issue, and supposing it is not a defence to the action that the lands and goods of A. B. were not sold by the commissioners, unless they had notice (meaning knowledge) of their existence, can the verdict be entered for the plaintiff *non obstante veredicto* on the implied confession in rejoinder, that if there were lands and goods, &c. the commissioners (the plaintiffs) had no notice of their existence?

6thly, Supposing the judgment could not be so entered, and the issue raised by the said rejoinder be immaterial, can a court of error award a repleader, and ought it to do so in this case?

7thly, Supposing a court of error cannot or do not award a repleader, what judgment ought it to pronounce? Ought it to be a judgment for the plaintiff on the whole record, on the ground that the other pleas, or the issues found thereon, contain a sufficient confession, or afford sufficient proof whereon to found a judgment for the plaintiffs, disregarding the immaterial issue?

On the 4th July 1839 the opinions of the judges were delivered as follow :—

Coltman, J.—The first question proposed by your Lordships in this case does not appear to me to be doubtful.

The condition of the bond is (amongst other things) that Richard Bigg shall well and truly pay to the receiver general all such sums of money as shall come to the hands of the said Richard Bigg, as such collector, upon the days and at the times by the said acts appointed for the payment thereof, and according to the true intent and meaning of the said acts. Now, the monies in question not having been paid to the service or account of that year in respect of which they had been assessed, but in payment of what must for this purpose be considered as the private debt of the collector, cannot, I think, be considered as having been paid according to the true intent and meaning of the acts; the condition of the bond, therefore, has been broken, and the bond forfeited.

To the second question proposed by your Lordships it ought, I think, to be answered, that the defence suggested would be a valid defence to an action brought against the surety. The question turns upon the proviso in the thirteenth section of 43 Geo. 3. c. 99. construed with reference to the fifty-second section of the same act. In stating the opinion I have formed, I speak with all deference for those who may differ from me on this and other points; but it seems to me, that, unless it is held that the commissioners are bound to exert legal diligence against the principal before suing the surety, the surety will be deprived of the benefit which the act intended to give him.

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The statute, section fifty-two, gives power to the commissioners to seize and sell the whole real and personal estate of the collector making default. It is obvious that the exercise of this power may be, and is likely to be, highly advantageous to the surety, and I conceive that the intention of the act was to give the surety the benefit, in the first instance, of this process, instead of compelling him to pay the whole amount of the arrears, and leaving him to seek for his indemnification by an action at law, or other more circuitous course, against his principal, at the risk of being defeated by accident or chicanery. This construction appears to me to be also most agreeable to the natural and obvious meaning of the words made use of in the proviso, and to be the sense in which any ordinary persons about to enter into a contract of suretiship would understand them. By putting a refined and artificial sense on the expressions, and by construing them otherwise than as the party contracting would be likely to understand them, we should be making the act of parliament a snare to those who might bind themselves as sureties upon the faith of its provisions.

To the third question proposed it should, I think, be answered, that it is no defence to the supposed action that the commissioners did not seize and sell lands, of the existence of which they had no knowledge before the commencement of the suit.

By the statute 48 Geo. 3. c. 99. § 13. it is provided, that no bond shall be put in suit against any surety for any deficiency other than what shall remain unsatisfied after sale of the lands, &c. of such collector, in pursuance and by virtue of the directions and powers given to the commissioners by that act. The question.

thereupon for consideration is, what the lands are which are to be sold under the directions and powers given by the fifty-second section of the act? By that section the commissioners, in their respective jurisdictions, are authorized and empowered to seize and secure the estate, real and personal, of the collector, to him belonging, or which shall descend to his heirs, executors, or administrators, wheresoever the same can be discovered and found. Now, although the word "wheresoever" is an adverb of place, and its proper sense should seem here to be in what place or in what hands soever, yet, taking the whole sentence together, it obviously implies that the collector may have property which cannot be discovered by the commissioners; and when the section goes on to direct the commissioners to sell and dispose of all such estates as shall be for the cause aforesaid seized and secured, it seems to me that by necessary implication the words "such estates" must be construed to mean such estates as the commissioners shall have discovered, for they cannot have seized and secured any other. This construction seems to me to be called for by considerations of public convenience, and to be in no wise unjust towards the surety, who may reasonably be expected, and, from a regard to his own interest, will naturally take care, to inform the commissioners of any property belonging to his principal which can be discovered.

I cannot but look upon the surety as being in a considerable degree identified with the party for whose acts he has undertaken to be responsible, and at least as having much better means of knowledge as to his circumstances than the commissioners; and if the surety is not able to discover the concealed property of his

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principal, it seems to me unreasonable to expect that the commissioners shall do it.

To the fourth question the answer, I think, ought to be, that the issue raised by the rejoinder must be deemed to have been found for the defendant.

To clear the way for the consideration of this question, it is necessary to state with particularity the substance of the pleadings.

The fifth plea alleges three matters of substance; first, that the collector was possessed of divers lands and goods which were subject and liable to be seized and sold, and might have been seized and sold; secondly, that the plaintiff had notice of this; thirdly, that the lands and goods had not been sold.

The replication alleges that the collector had not any lands of which the plaintiff had notice, and that some of his goods had been seized and sold, and that there were no other goods belonging to him within the jurisdiction, of which the plaintiff had notice.

The rejoinder is, that the collector had divers lands which the commissioners could and might have seized and sold, and that all the goods of the collector which could, and might, and ought to have been discovered were not seized and sold in manner and form as the plaintiff had alleged, and thereof the defendant put himself upon the country.

Now, in the allegations of this rejoinder, as it seems to me, no assertion of notice to the plaintiff is involved. That it is not asserted in express terms is clear, and I see no reason to think that the defendant intended to involve it; on the contrary, he appears to have omitted it designedly, and to have inserted what seems intended as a substitution for the allegation of notice, when he avers

that the goods could, and might, and ought to have been discovered. I cannot, therefore, see any ground for extending the sense of the issue tendered beyond what the words naturally import.

Taking this to be the effect of the rejoinder, it cannot but occur to ask whether any issue at all is joined? For the rejoinder contains nothing contradictory to the allegations in the replication; on the contrary, the two are entirely consistent.

To make an issue, regularly, there should be an affirmative on one side and a negative on the other, meeting each other directly; and various cases are to be found in our law books in which, for a neglect of this rule, it has been held that no issue had been joined, and that the defect was not aided after verdict, but that the verdict was a nullity. See *Sandback v. Turvey*, Croke, Jac. 585; *Oxford v. Rivett*, Croke, Car. 79—93; *Derby v. Hemming*, Croke, Car. 593; *Kirle v. Lees*, 3 Leon, 66.

There are other cases, however, in which the same strictness has not been observed, and in which, after one party has made an allegation and offered to go to the country upon it, and thereupon the similiter has been added and a trial had, it has been considered as an agreement by both parties to go to trial upon that allegation, and an informal mode of joining issue upon it, which, as far as that informality is concerned, is aided, after verdict, by the statute 32 Henry 8. c. 30; see the cases of *Walthall v. Aldrich*, Croke, Jac. 588; *Parker v. Taylor*, Croke, Car. 316; *Burton v. Chapman*, Sid. 241; 2 Keble, 278. 280. It is difficult to reconcile these two classes of cases with each other; but it appears to me reasonable to adhere to the latter class, and to hold that where the parties have, by going to the country

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on a particular point, agreed to treat it as an issue joined, it should be considered, after verdict, as being such, though informally joined.

The result is, that the parties in this case are to be considered as having joined issue upon the allegations contained in the rejoinder, that rejoinder not importing any allegation of notice.

I consider, therefore, the issue as being in substance only this, whether Richard Bigg had any lands and goods which were not seized and sold.

The rejoinder in terms says, in addition, that the lands might have been seized and sold, and that the goods could, and might, and ought to have been discovered; but it does not appear to me that under these terms any separate issuable matter of fact is asserted, or that by the insertion of them the nature of the issue is changed; for, when it is said that the lands could and might have been seized and sold, it is but the statement of a conclusion resulting necessarily from the existence of the lands; and when it is said that the goods could and might have been discovered, the assertion, standing nakedly, as it does, is but the assertion of a possibility, which necessarily results from the fact of their existence. When it is alleged that the goods ought to have been discovered, that is not an allegation of a fact to be proved, but of a legal obligation supposed to result from the facts alleged.

Considering, therefore, the only fact in issue to be, whether Richard Bigg had lands and goods not sold before the action brought, and it being found by the verdict that he had, I think that the issue raised on the fifth plea is found for the defendant.

But although the informal mode in which the issue is

joined is, I think, cured, after verdict, by the statute, there is another defect in the issue which is not aided by the statute, namely, its immateriality; for, notwithstanding some early cases to the contrary, it is now well settled that a verdict, though it may cure an informal, cannot cure an immaterial, issue. The verdict, therefore, though found for the defendant, cannot give him any title to a judgment in his favour.

The case is the same if the true view of the pleadings is, that no issue at all is joined; for in that case the verdict is to be considered as a nullity, as far as the fifth plea is concerned, and consequently the defendant cannot be entitled to judgment upon it; *Sandback v. Turvey*.

To your Lordships fifth question it ought, I think, to be answered, that judgment cannot be entered for the plaintiff non obstante veredicto, on the implied confession in the rejoinder, that the plaintiff had no notice of the existence of the lands and goods in question.

The ground on which such a judgment may be given is explained by Lord Holt in *Staple v. Heydon*, 2 Lord Raymond, 924, 6 Mod. 10, 2 Salk. 579, 3 Salk. 121, where he is reported in substance to have said, "Where the defendant confesses a trespass, and avoids it by such a matter as can never be made good by any sort of plea, there, in such case, judgment shall be given upon the confession, without regard to the finding upon an immaterial issue; but where the matter of justification is such a matter as, if it were well pleaded, would be a good justification, there, though it be ill pleaded, yet that shall not be taken to be a confession of the plaintiff's action; and the books do,

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“ all of them, if they be narrowly looked into, turn
“ upon this difference, where the confession is full and
“ the matter of the plea is ill in substance;” and the
form of entering up the judgment is quite consistent
with the principle here laid down by Lord Holt. See
Viner’s Abridgement, Judgment, D. plac. 1, Willea, 366.

The present case does not fall within the rule so laid
down, for the defendant’s plea, if true, in point of fact,
is a valid defence to the action ; and no instance can be
found in which judgment has been given non obstante
veredicto, except where the plea pleaded by the defend-
ant has been insufficient in point of law.

But it is said, that the Court must consider it as
established upon this record, that one of the material
allegations of the plea, namely, that of notice to the
plaintiff, is not true ; for the replication asserts that the
collector had not any lands of which the plaintiff had
notice, nor any goods, but those sold, of which they had
notice ; and the rejoinder, by not re-asserting the notice,
must be considered as having admitted its non-existence,
and consequently the record must be considered as if
the plea had not contained any allegation of notice, in
which case it would have been insufficient in law.

Now, although it should be conceded that, upon the
trial of the issue raised, the want of notice must be
considered as admitted, it would not follow that when
the issue is found to be immaterial, and the question
arises whether there ought to be a repleader or a
judgment non obstante veredicto, the non-existence of
notice is to be considered as an established fact.

The case seems rather to range itself in the class of
those in which the defendant may have failed through
mispleading, rather than an inherent defect in the

substance of his defence. He may have mistaken the law, and selected the wrong fact to put in issue; but if a replender were awarded, he might, for any thing the Court can see, succeed in establishing the plea originally put forward as the ground of his defence.

But it may be urged, that, in the case supposed in your Lordships question, the finding of the jury has established the non-existence of notice. To this the answer is, that the finding in question is of a matter not within the compass of the issue; and the Court, I conceive, cannot pay any regard to a finding by the jury which has no tendency to decide the issues raised by the pleading, for the jury is sworn only to decide the issues joined, and the parties cannot be supposed to have come prepared to try any thing else. The jury, in the case supposed, have found as a fact that there was no notice to the commissioners; but the question, whether there was such notice or not, not having been put in issue, cannot be considered as ever having been tried, and judicially determined.

These reasons, combined with the absence of all precedent for pronouncing a judgment non obstante veredicto, in a case where a valid and sufficient plea was pleaded in the first instance, have led me to the conclusion that such a judgment cannot be given in the present case.

To your Lordships sixth question the answer is, that a court of error cannot award a replender.

In the case of *Holbeck against Bennett*, 2 Saunders 319, 2 Keb. 769. 689. 825, 2 Lev. 11, it was said by Lord Hale, that, in the King's Bench, on error from the Common Pleas, it was anciently the custom to award a replender, for which he cited many records; but he

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said it was obsolete, and not in use in his time, and had not been done for 100 years.

Subsequently to this case it has been commonly received in the law, and it is to be found in many text writers, that a repleader cannot be awarded by a court of error, and I think rightly so; for it is to be observed, that to deny a repleader where it ought to be awarded, is error; *Staple v. Heydon*. And it seems to follow, that if a court of error can award a repleader, it would be bound to do so in all cases in which the inferior Court ought to have done so. If, then, it were held that courts of error have the power to award a repleader, it would follow that they have done wrong in the course they have been pursuing for so many years; a supposition which cannot be admitted, under a system of laws professing, as the English code does, to rest mainly upon precedent.

To your Lordships seventh question it should be answered, that if judgment cannot be entered for the plaintiff non obstante veredicto, and if the Court cannot or do not award a repleader, the judgment given in the Court below ought to be reversed, and that judgment cannot be pronounced for the plaintiffs on the whole record, on the ground suggested.

Your Lordships question renders it necessary to consider the doctrine on which the case of *Goodburne v. Bowman*, 9 Bingham, 532, rests; and it will appear, on consideration, that the present case does not fall within the principle on which that case, as I understand it, proceeded.

The declaration in *Goodburne v. Bowman* was for a libel. The defendant pleaded the general issue, and several special pleas justifying the libel as true. The

verdict was for the plaintiff on the general issue and on one of the pleas of justification, and for the defendant on the other pleas.

The plaintiff applied for judgment non obstante veredicto. The Court were of opinion that the special pleas contained a confession of the action, and that the answer set up was insufficient by way of avoidance.]

But it was observable in that case, that some of the allegations of the declaration were admitted by implication only, and not in express terms; and a doubt might be suggested whether there was a sufficient confession of all the material allegations of the declaration; the Court, therefore, went on to say (as I understand their meaning) that, even if they were not fully confessed by the special pleas, yet, inasmuch as they were put in issue by the plea of the general issue, and had been proved upon the trial, and a verdict had thereupon, they were as effectually established on record as if directly and in terms confessed; and the justification being bad in substance, they held that the plaintiff was entitled to judgment on the whole record.

But the present case is different; no question is made here whether there is a sufficient admission of the material allegations contained in the plaintiff's declaration; but the ground on which the plaintiff is not entitled to judgment is, that the Court cannot see that the avoidance is insufficient, inasmuch as, upon an examination of the fifth plea, and the issue raised upon it, the Court cannot see sufficient ground for assuming the falsity of the allegation of notice contained in the plea. Now, if it had appeared judicially, from any other part of the record, that the plaintiff had had no such notice, the case of *Goodburne v.*

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Bowman would have furnished a precedent in the plaintiff's favour.

But I see nothing in any other part of the record which can clear up the ambiguity on this point, the finding of the jury respecting notice not being entitled to be considered as a judicial determination on that point, for the reasons adverted to in a former answer.

In this state of the case it seems to me, that the judgment which ought to be pronounced should be, simply, a judgment of reversal, which will leave it open to the parties litigant to bring a new action, if so advised.

Coleridge, J.—In answer to the first question propounded by your Lordships I beg to state, that, in my opinion, the conduct of A. B. in the case supposed was a breach of the condition of the bond. Upon this question it will not be necessary to state the reasons for my opinion at any great length.

The bond and the condition are framed to secure the due discharge of the duties of the collector in his office. His office is but for a year's duration, and his duty (amongst other things) is to pay the receiver general, at the times specified, the monies which he shall collect upon the assessments for the year, in discharge of those assessments. To pay them in discharge of the arrears of former assessments is no more such a payment than to pay them on any private account to the receiver general, or to any other person, would be. Whether this were done with or without the participation or collusion of that officer seems to me immaterial.

The condition is broken, if, with the knowledge and

by the act of the collector, in whole or in part, the monies collected are not paid in discharge of that assessment under which they were collected.

In the case supposed in your Lordships second question, I am of opinion that it is a defence to the action, that the commissioners did not, before the suit, seize and sell the lands and goods there mentioned, if such action be brought against the surety. This seems to me to flow, as a necessary and direct consequence, from the language of the first proviso in the 13th section of the 43d George the Third, cap. 99, and I can give no effect to that proviso, which was evidently framed to make a distinction between the principal and surety in favour of the latter, unless by so construing it. The bond is taken under the provisions of that section, and it seems to me that the proviso is virtually incorporated in the condition of the bond; and that it limits the liability of the surety to the making good the deficiency remaining after sale of the collector's lands and goods. Many reasons in support of this view of the case occur to the mind, and have already been suggested in the printed judgment already delivered in the case of *Gwynne v. Burnell and another*, now before your Lordships; but it seems to me more satisfactory to rely on the unambiguous language of the proviso itself. According to that, the surety is made liable to be sued, not for every deficiency, but a particular and limited deficiency, i. e., that which shall remain after sale of the lands, tenements, goods, and chattels of the collector. That liability only he must be taken to have contemplated when he sealed the bond. To hold that he may be sued, before sale, for the general deficiency, is to

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subject him to a different and enlarged liability, and in effect to expunge the proviso from the statute.

3d. I am equally of opinion, that the want of seizure and sale by the commissioners will be an answer to the action, although they had no knowledge, before the commencement of the suit, of the existence of the lands and goods.

This opinion I express with much diffidence, because I have reason to fear that it differs from that entertained by some of my brethren; but I arrive at it upon the same principle which led me to my answer to your Lordships second question; the principle, namely, of collecting the meaning and intention of the statute from the unambiguous expressions used, rather than from any notions which I may entertain of what is just or expedient.

Having considered, with attention and respect, the reasons that have been stated in support of a contrary opinion, I am bound to say that they have not satisfied my mind. The question arises, simply, on the construction of the proviso before referred to; in terms it is silent as to notice to the commissioners, or knowledge had by them. The words are, "no such bond shall be put in suit against any surety for any deficiency, other than what shall remain unsatisfied after sale of the lands, &c. of such collector, in pursuance and by virtue of the directions and powers given to the commissioners by this act;" and the question is, whether these words are to be understood as if, instead of them, the statute had said, "all lands, &c. of such collector, of the existence whereof, or otherwise, the said commissioners shall have been apprized by the said surety

“before the commencement of such suit.” This is the question, and the test by which I think it ought to be tried is this, whether this addition is a necessary implication from the words already used, in order to give them a sensible meaning and effect. If by this test I can see that the proposed addition is already necessarily contained, although not expressed, in the statute, it is of course not the less cogent, because not expressed; but I cannot concede that we are at liberty, upon any ground whatever, to add a new term to the statute. In saying this I am not unmindful of the dicta to be found in our books, nor of decisions upon old statutes, which seem to warrant a more free dealing with the written law; and whenever acts of parliament shall again be framed with the generality and conciseness with which the legislature spoke some centuries since, it may be fit to consider the soundness of that principle of interpretation which they involve; but it is enough to say, that it is wholly inapplicable to a modern statute, in which the legislature is careful to express all it intends in so many words, that to go beyond their necessary implication is to make, not to interpret, law. The principle, then, on which I rely will not let in the consideration of particular circumstances in each case, or a regard to a greater or less degree of convenience,—a more or less complete effect to be given to the presumed intent of the legislature; nothing, in short, which is founded on what the legislature might better have done, nor simply even what the legislature intended. The sole legitimate inquiry is, I conceive, what intention is to be found in the words of the act expressed or implied; unless, by words written or words necessarily implied,

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and, therefore, virtually written, the intention has been declared, we cannot give effect to it.

Now that the words are sensible by themselves, as read without any implied addition,—nay, that the proviso being framed confessedly for the benefit of the surety,—the absence of the proposed addition will more largely effectuate its general intent, can, I think, scarcely be denied. The argument, indeed, takes another direction, that it is necessary to qualify or restrain the proviso, by implying the necessity of knowledge in the commissioners, in order to prevent the words from having their full natural operation, because that would defeat the very object of the section itself. This seems to me avowedly to be an alteration of the statute, and, therefore, I should not feel removed from my position if I were to concede that the effect of my interpretation would be what is alleged; I am not, however, driven to such a concession. If the commissioners do their duty, they will, before the appointment of collectors in any of the three modes pointed out by the 9th, 13th, and 14th sections of the statute, and before the admission of any persons to be sureties, take care to inform themselves of the properties of the collectors, in such a manner as to prevent any practical difficulty arising from the proviso. I observed, in passing, that, though there are three modes of appointment mentioned in the statute, and in one of them the commissioners themselves are the parties to select the collector, yet the same form of condition, and the same proviso, applies to all; a circumstance not without its weight in respect of the argument founded on the difference as to the knowledge of the circumstances of the collector, which,

it is said, may be presumed to exist between the commissioners and the sureties.

I do not notice in detail the different suggestions which have been made in favour of the qualified interpretation of the proviso, and which are founded on considerations of inconvenience, or liability to fraud, in the literal one, because my argument, if a sound one, denies the admissibility of any such considerations. But one argument which has been usual demands an answer: it is said, that, the proviso being for the benefit of the surety, justice requires that he should inform the commissioners of those circumstances which bring him within its reach. I own this appears to me to beg the question, or to misrepresent the situation of the parties. If my contract has only been to be answerable for what shall remain after seizure and sale of my principal's property, if you cannot sue me for any thing till you have exhausted that primary fund, what principle of justice requires that I should undertake the responsibility of discovering that fund? Why am I to help you to the performance of this condition, which is to give you a right of action against myself? If, indeed, it can be shown that I collude with my principal, or take any step to conceal or make away with his property, any presumption may properly be made against me. Something analogous to this, though not expressly in point, is the course of decisions with regard to the landlord's re-entry, under the 4th George 2. cap. 28, where no sufficient distress is found on the premises. The burthen of search in every part of the premises, and of proof that no distress was there, is cast on the landlord; but if the tenant is shown to impede such search in

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any way, the presumption immediately shifts, and is cast upon the tenant.

I cannot but feel, in conclusion, that the argument on the other side is but a disguised attempt to alter a law which is thought to be imperfectly expressed. To do this is always unjust in the particular case, because it works an *ex post facto* alteration of the contract between the parties, and unsound in legal principle. My sense of the practical importance of this doctrine must be my excuse for having troubled your Lordships so long with my answer to the third question.

4th. In answer to your Lordships fourth question, I beg to state that, in my opinion, on the facts supposed, the issue raised by the rejoinder ought to be found for the defendant. The allegation and denial of notice in the plea and replication appear to me immaterial; the rejoinder, therefore, rightly passed them over, and tendered the issue on that which was material, on which there has been a sensible finding by the jury.

5th. As a judgment of *non obstante veredicto* is always upon the merits, and assumes, not only that the defence, even if good in form and true in fact, is bad in law, but that it discloses a confession of the plaintiff's case, the hinge upon which the answer to your Lordships fifth question will turn must be, whether the rejoinder, being by the supposition, but not in my opinion, bad in point of law, though true in fact, also confesses the remaining allegations of the replication which it has not denied? In terms a pleading of this description, which merely selects for denial one of many facts alleged in the previous pleading, admits nothing as to the residue. For the purpose, indeed, of trial before

the jury, every thing is admitted but that which is denied; where, however, the fact so denied and found is immaterial, a distinction has always been taken between a pleading of this sort and one which confesses and avoids. In the case of *Plummer v. Lee*, 2 Meeson and Welsby, 495, the Court of Exchequer acted upon this distinction. The same distinction in principle appears to have been recognized as early as in the case of *Potts v. Polehampton*, 1 Lord Raymond, 390, in which Lord Holt took this difference,—that where the defendant's plea confesses the duty demanded by the plaintiff, and does not avoid it sufficiently, if the issue be immaterial and found for the plaintiff, he shall have judgment; but if the defendant's plea goes in discharge of the action, and the issue is taken immaterially, and a verdict for the plaintiff, a repleader shall be granted. I therefore beg to answer this question in the negative.

6th. In the case of *Bennett v. Holbeck*, Lord Hale said that it had even then become obsolete for the Court of King's Bench to award a repleader on a writ of error, and it has ever since, I believe, been the understood practice that a repleader cannot be awarded by a court of error. Your Lordships are not in possession of the record, and I do not see how you can carry into effect that which judgment of repleader is intended to produce. This judgment directs that the parties replead, and the cause begins again from the point at which the defect in the pleading appears; it is calculated, therefore, to bring them to a material issue in fact or law; and the House would be called on to perform the functions of an original court, for the trial of the error, without having the record in its possession, or the means of summoning a jury, giving a day to the parties,

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or using any of that machinery by which, in the Courts below, causes are regularly carried on to judgment.

7th. Your Lordships seventh question is new ; in answering it, I must assume that the opinion which I have ventured to express in answer to your third question is erroneous ;—and also, that if there had only been the fifth plea pleaded, the Court below should have directed the parties to replead. In that state of things, as I have already stated that I think your Lordships cannot award that judgment, I see no other course, that would have been open for this House, but, simply, to have reversed the judgment for the plaintiff, pronounced below. The question then arises, whether the fact of there being other pleas and other issues on the record, so found that upon them a satisfactory judgment could have been pronounced for the plaintiffs below, if the fifth plea had not been pleaded, will enable this House now to pronounce that judgment, although the fifth plea be there, and the issue arising on it not disposed of satisfactorily? Upon principle, I should have no difficulty in answering this question in the negative ; the fifth plea is pleaded to the whole cause of action. In what way a material issue raised upon it may be disposed of, the House cannot at all anticipate judicially ; it may be for the defendant below, and if so, all the other issues become wholly immaterial. To pronounce judgment, then, as to the whole record, in this state of it, is to exclude one party from a defence on which he relies,—to prejudice one defence by conclusions drawn from the demerits of other defences. This injustice is prevented by the rule, which I had always considered universal and inflexible, that

each plea was to be looked at by itself for all purposes, except where, by reference, it incorporates any of the allegations of another.

If, indeed, the House saw that the issue on any one good plea was in favour of the defendant, the merits of the other pleas might be disregarded; but that is only because they then become immaterial as to the final issue of the cause.

I have stated that, upon principle, this did not appear to me a difficult question; but I am aware of the case of *Goodburne v. Bowman*, where, in a considered judgment of the Court of Common Pleas, expressions are to be found at variance with the opinion I have expressed. I feel the full weight of that high authority, but I am bound to express to your Lordships the opinion which I still entertain; and it is some satisfaction to me to observe, that the principle on which I rely is expressly asserted in the same judgment, and that the departure from it, which I cannot acquiesce in, is not necessary to the decision then made by that Court. Upon the whole, therefore, my answer to this question is, that, on the supposition made, the judgment below ought to be simply reversed.

Williams, J.—1st. As it so happens, singularly enough, it seems, that upon the first question proposed there is no difference of opinion, I shall trouble your Lordships very shortly in answer to it. I think that the payment of part of the money received by the collector for the year 1828 to the account or service of former years was a clear breach of the condition of the bond; it seems to me that such application of the money differs in no respect from the payment by the collector of any other

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debt contracted at any other time and in any other manner.

2d. The answer to the second question must depend upon the true construction of the proviso in the thirteenth section of 43 Geo. 3. c. 99; that section, after declaring that collectors, if required, shall find good and sufficient security by bond, in the manner prescribed, has the following proviso: "That no such bond shall be put in
" suit against any surety or sureties for any deficiency
" other than what shall remain unsatisfied after sale of
" the lands, tenements, goods, and chattels of such collector, in pursuance and by virtue of the directions
" and powers given to the respective commissioners by
" this act." In considering the true intent and meaning of this proviso, I pass by the opposite inconveniences, which have been pressed in argument, by observing, that they may probably be considered as balancing each other. Our business, however, is with the construction of the statute, and if that be ascertained, consequences are to be neglected, and the proper construction is, to give effect to the intention of the legislature as far as possible; and if there be provisions seemingly inconsistent, to reconcile them, so as to further that intention. This, I apprehend, is true generally, and will probably not be doubted. If, however, any authorities be requisite, they may be found in Comyn's Digest, Parl. R. 10. Now, that the proviso was introduced expressly for the benefit of the surety, seems to me to admit of no doubt; I can attribute to it no meaning or effect at all, except that be the object. The language seems to me to be perfectly plain and appropriate; the object also is quite consistent with the position of the surety, and has relation to the principal, because there is nothing in the bond in

question or in that relation to raise an inference that the former should be liable except upon failure of the latter.

This proviso also is introduced in a manner equally consistent with this view of the subject; in the earlier part of the section the liability of the surety is described, and then comes the proviso imposing a restriction upon that liability; except, therefore, the application of the land and goods, if any, be deemed a condition precedent to calling upon the surety to make good the deficiency, no effect is given to the proviso, and it might as well be expunged altogether; either the proviso does impose this condition, or, in my opinion, it does nothing. I am desirous to bring before your Lordships, in as compact a form as possible, what occurs to me upon this part of the subject; it has been pursued more fully and in detail, if that should be thought worthy of reference, on a former occasion. I have before observed that the words of the proviso seem to me plain and unambiguous; they are, "no such bond shall be put in suit for any deficiency other than what shall remain unsatisfied after sale of the lands, goods, &c. of the collector;" that is, no bond shall be put in suit for the arrears of the collector, but only for the deficiency, if any, after his property has been applied, as in reason and justice it ought to discharge those arrears, as far as it will go.

The distinction seems to me to be obvious, and plainly marked, between the collector and the surety. By the fifty-second section, which contains the directions and powers alluded to, in the proviso the commissioners are authorized and empowered (not required) to make sale of the lands and goods of the collector; against him, therefore, the bond may be put in suit before sale, for he

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is not within the benefit of the proviso; whereas that was framed expressly for the protection of the surety, and he (the latter), in my opinion, cannot be sued before sale made, if practicable.

When I before observed to your Lordships that the language of the proviso seemed to me to be free from doubt, I was not unmindful of the criticism which has been made upon the words "no bond shall be put in suit," as if they were distinguishable, and might have a different meaning, from "no action shall be brought" or "no proceeding shall be had or taken." I, however, am unable to perceive any distinction, and cannot but think that, both in common parlance and in legal acceptance, the terms are identical, and have precisely the same meaning. That they would be so understood in a popular sense, I think, is beyond a doubt, and that they ought to be so understood legally, I also think. I observe that Lord Tenterden, in the case of *Pepper and others v. Cooper*, 2 B. & A. 431, where the question was upon this same act of parliament, uses two of the phrases in exactly the same sense. His Lordship, whose general precision and accuracy of expression are well known, observes, "I am clearly of opinion that the bond might be put in suit without selling the goods of Pepper, who was a mere surety, for, though it appears on the face of the bond that he was a collector also, still he is not the collector contemplated by the act, whose lands and goods must be sold before proceedings are had upon the bond against the surety." And what is the distinction between "proceedings had upon the bond" and "action brought upon the bond?" Mr. Justice Holroyd says, "I also think that this bond may be put in suit against

“ the surety, although it may happen that another
 “ person has been jointly appointed collector, without
 “ first selling the lands and goods of that person, for
 “ the collector contemplated by the act, whose goods
 “ are to be sold previously to the bond being put in
 “ suit, is the collector who has made default.” Having
 mentioned this case with a view to the understanding
 of the expressions upon which I was commenting, I beg
 leave to observe, that I would by no means press or
 strain any inference deducible therefrom; I am quite
 aware that it is no authority bearing upon the present
 case, nor any thing like it. The decision merely is,
 that, whereas two collectors had been appointed, and one
 only had made default, it was not necessary to sell the
 non-defaulting collector's lands and goods before having
 recourse to the surety; but it is at the same time
 undeniable that both the learned judges do expressly
 allude, to say no more, to the sale of the defaulting
 collector's lands and goods as a condition precedent to
 resorting to the surety. This view of the subject seems
 to be in conformity to what was very early laid down
 upon it in chap. 8. of Magna Charta :—“ How sureties
 “ shall be charged to the king. We, or our bailiffs, shall
 “ not seize any land or rent for any debt as long as the
 “ present goods and chattels of the debtor himself be
 “ ready to satisfy; therefore neither shall the pledges
 “ of the debtor be distrained as long as the principal
 “ debtor is sufficient for the payment of the debt; and
 “ if the principal debtor fail in payment of the debt,
 “ having nothing wherewith to pay, or will not pay
 “ where he is able, the pledges shall answer for the debt;
 “ and if they will, they shall have the rents and lands
 “ of the debtor until they be satisfied of that which

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“ they before paid for him, except that the debtor
“ can show himself to be acquitted against the said
“ sureties.”

The third question I must beg leave to answer with some qualification, the reason for which I hope to make apparent, when, in answer to the next question, I shall have to consider the effect of the rejoinder to the replication to the fifth plea, the finding of the jury thereon, and the general result therefrom. If I am to suppose that the commissioners “had no knowledge,” after due and reasonable diligence exerted by them to ascertain the fact of the existence of lands and goods of the collector which they might have seized and sold, it seems to me that, under such circumstances, a good defence could not be made by the surety. If, however, the commissioners “had no knowledge,” from the same cause that always occasions ignorance, simply not trying to learn, I think there may be a good defence from the fact of the possession of the lands and goods by the collector, after his default, and before action brought, even though the commissioners, upon the supposition last made, were ignorant of the existence of either. This is said upon an assumption at present (to be considered more fully presently) that neither from the statute nor from any general rule of law is the surety bound to give any notice, or furnish any knowledge (your Lordships, it seems, understanding the expression to be equivalent,) whatever to the commissioners of the existence of the lands or goods of the collector. I will endeavour to explain my meaning by reference to the pleadings themselves: suppose the fifth plea to have stood as it does, omitting the allegation of notice; if the replication, by appropriate allegations, had shown reasonable diligence

in the commissioners to discover lands and goods of the collector, and that none could be found, it seems to me that such replication would have been an answer to the plea; if, on the other hand, the replication had merely stated that the commissioners had no notice or no knowledge of any lands or goods, it would, in my opinion, contain no answer at all, and would be bad on general demurrer.

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4th. The fourth question raises the point upon which so great a difference and variety of opinion unfortunately exist amongst the judges; and in our answer to the question I adopt the supposition contained in it, namely, that issue has been joined upon the rejoinder, and upon that issue that there is a finding of the jury in the words stated in the question, and that finding is in its terms for the defendant below. Whether it be so in substance remains to be considered; and for this purpose it may be necessary to advert to the course and state of the pleadings from the said fifth plea downwards. That plea alleges, that, before the exhibiting of the bill, the collector had lands and goods within the jurisdiction of the commissioners, which might have been seized, &c., of which the plaintiffs had notice. The replication thereto is, that the collector had no lands of which the plaintiffs had notice, and that all the goods of which the plaintiffs had notice were seized and sold, and that after such seizure there were no goods, &c. of which the plaintiffs had notice, liable to be seized, &c. The rejoinder (dropping all mention of notice) states, that, after failure by the collector, he had lands which ought to have been seized and sold, and that all the goods, &c. of the collector at his failure, which could and might have been discovered and found, were not seized and sold; and

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concludes to the country, and the plaintiffs do the like. And how far the facts contained in that rejoinder and the corresponding finding of the jury amount to a defence, without the fact of the plaintiffs below having notice of such lands and goods, is the question ; and that, perhaps, may be tried, as conveniently as in any other manner, by examining whether the fifth plea would have been a good defence to the action, if the allegation of notice had been omitted altogether. The statute is entirely silent upon the subject ; the proviso, in especial aid and protection of the surety, contains no allusion to notice being requisite from him ; nor is there, in my opinion, any thing in the relation of the surety to his principal requiring any such notice from him. The language of the fifty-second section, "wheresoever the same can be discovered and found," to which reference has been made upon this part of the case, seems to me to have relation merely to the powers of the commissioners in the pursuit of the property of the collector, and to enlarge those powers. I cannot think that it bears upon the question of notice from the surety, or that it is possible to construe the meaning of the expression to be, that such property as the commissioners had not notice of from the surety must be deemed property "that could not be discovered and found;" and, moreover, when, it may be asked, is notice to be given by the surety? It is not pretended that any is due to him, and, accordingly, the first information he will receive of the failure of his principal, and his own liability, will probably be by the service of the writ.

But, further, it seems to be material to ascertain what the rule of law generally is with respect to the necessity of averring notice ; and upon this point I take

it to be clear that, where a fact lies equally within the knowledge of both parties, the party pleading need not aver notice to the other; and still less is it necessary where the means of knowledge are more especially within the reach of that other. Upon a point, I presume, partly questionable, I should be sorry to weary your Lordships with unnecessary citation, and will, therefore, refer generally to the case of *Cutler v. Southern*, 1 Saund. 117, and note 2. by Serjeant Williams, and to 2 Saund. 62 a., note 4. As this point, however, seems to me to have an important bearing upon the whole subject, I will refer more particularly to one case only, of some notoriety, in which this question arose. I allude to the case of *Rex v. Holland*, 5 Term Reports, 607, which was an information against the defendant, with others, for malversation in office, whilst one of the council at Madras, for not having foreseen and provided against the outbreak of Tippoo Sultan. The seventh count of that information charged, especially, that the defendant had not sent notice of the rupture between the Sultan and the East India Company to the governor at one place and a general at another. To the information there was a general demurrer, and the objection to the said seventh count was, that there was no averment of notice to the defendant of the said rupture, which he was charged with not notifying to others. The court, observing that the case was one of great importance, took time to consider of their judgment, which Lord Kenyon afterwards delivered. Upon this point he is reported to have said, "The objection" (that is, to the seventh count,) "that notice to the defendant was not sufficiently averred, seemed to be " pretty much abandoned by the defendant's counsel,

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“ in consequence of what fell from the court. The
“ rules stated by Mr. Wood in his argument seemed
“ to show the true grounds upon which notice is or is
“ not required to be averred ;” and, upon reference, it
will be found that the rule which received the matured
approbation and adoption of the court is thus laid
down : — “ Notice here means knowledge,” (as your
Lordships understand it in this case,) “ and where the
“ matter is as much in the knowledge of the defendant,
“ or more than in any other person, the law presumes
“ that he had knowledge ;” 16 Vin. Abridg. Notice, A.
2, placita 10 and 12. No one is bound by the law
to give notice to another of that which that other person
may otherwise inform himself of. And again, “ Notice
“ is not necessary where the thing lies as much in the
“ cognizance of the one as the other.” “ Now, here”
(continued the late very learned Baron) “ all the facts, of
“ which the defendant should have had notice, are of
“ such a nature that it was his duty, as a member of
“ the council, to know them.”

It remains, therefore, to consider how the matter
stands, as between the surety and the commissioners, in
this particular, and in so doing I shall reject all attempts
at an inference arising from general probabilities, (such
as, the care and foresight of the surety in entering into
the engagement, or the contrary,—what inquiries he
might or might not make into the substance of his prin-
cipal,) as utterly precarious and insecure. It seems to
me that our duty is to examine what and with whom
the means of knowledge are, according to the provisions
of the act of parliament itself. Now, so far as the
surety is concerned, the statute, as might be expected,
is silent ; as to the recommendation of caution, or means

of information, he is left to himself. With the commissioners, however, the case is otherwise. By the ninth section the commissioners are to appoint assessors, who are to act upon oath, and, moreover, are to be charged and instructed by the commissioners in the requisites for discharging their duty. Further, by the same section, the assessors are to return two or more able and sufficient persons, of the places for which the assessors act, to be collectors. It seems to be clear, therefore, that, in the due performance of their duty, the assessors are bound to inquire into the sufficiency of the persons returned, including, of course, their substance and property; and if the matter had rested here, it might, perhaps, have been not unreasonably considered as a statutory mode, pointed out to the commissioners, of ascertaining, by deputed authority, the means of the persons to be appointed. But the section goes further, and enacts, that the persons so returned by the assessors are to be appointed by the commissioners; and, as persons are presumed to do their duty, (and particularly when acting upon oath,—for the commissioners also are sworn,) it must be taken as against them (the commissioners), that they became acquainted with the property of the persons about to be appointed, and of this collector Bigg among the rest. And this supposition and construction are the more probable and reasonable, because the collector is not required by the thirteenth section to find security at all events, but only if required by the commissioners. This, therefore, seems to imply that the commissioners ought to inquire in each case, or else how can they exercise a discretion as to requiring or dispensing with security in the case of each appoint-

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ment; and why, then, is notice to be required from the surety to those who, by the very supposition of having done their duty, have acquired knowledge already?

Upon the whole it seems to me, that this case is brought abundantly within both or either of the rules or conditions dispensing with the necessity of averring notice. When, therefore, I find that the rejoinder contains the same allegations which would have been sufficient to make the fifth plea good and a defence to the action, and that on the twelfth issue (in the terms stated in the question) raised upon the rejoinder, the finding is for the defendant below, my opinion is that the issue ought to be found for him. It is true that the jury do also find (in the manner stated) "that the commissioners "had not notice." But it is to be observed, first, that this fact is not included in the issue, and next, that, admitting the finding of such a fact to be within the competence of the jury, it is not, without more, (for the reasons, such as they are, already given at a length, I fear, inconvenient to your Lordships,) available for the plaintiffs below. This circumstance, therefore, does not affect the conclusion at which I have arrived, and which is as above stated.

- I have mentioned, at the outset, that my answer to this question proceeds upon the supposition, that there is an issue joined, and that too in the terms of the rejoinder to the replication to the fifth plea. I must, however, take leave to state to your Lordships, that I entertain great doubt (to say no more) whether there be any issue joined at all; because there certainly is not an affirmation and denial of the same fact or facts in that replication and rejoinder, except, indeed, all that is alleged in

the replication about notice can be considered as wholly without meaning, which it seems very difficult to say.

5th. To avoid repetition, I have endeavoured to bring together, in answer to the third and last questions, almost all that occurs to me upon the whole subject; and from those answers it is obvious that my opinion is against a part of the suppositions contained in this (the 5th) question. Adopting, however, as I am bound to do, those suppositions, my answer is still in the negative, because, first, I do not think there is any such admission as that alluded to, and next, if there be, that the consequence would follow, that judgment non obstante veredicto can be entered for the plaintiff below. It surely cannot be carried to the extent of admitting no notice or knowledge after due means used to obtain it. Differing, as I have the misfortune to do, from my brother Littledale, upon the point of notice, I agree entirely with his observations upon this part of the case in the Court below. He is thus reported: "The plaintiffs below may contend that they are entitled to judgment non obstante veredicto, but there seems to be a great difficulty in doing that, for the rejoinder is not one which shows that the defendant below has no defence upon the whole case, which is the ground for entering such a judgment; for the finding of the jury, that Bigg had lands and goods, is not like an allegation which furnishes no defence; but it is part of an allegation which, coupled with something else, would constitute a defence, and that something else is imperfect, and does not form part of the issue which the jury ought to try, and which, if found one way, would show that was a defence, but in the other way not."

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If, as is certainly done continually, a venire de novo may be awarded by a court of error, it seems difficult to assign any very good reason why it may not award a repleader. My learned brothers, however, have almost all expressed an opinion that it cannot be done. Lord Hale is reported to have said, (after referring to many cases in which a repleader had been awarded,) "that it is obsolete, and not in use at this day." The books of practice assume that it cannot be done, and I cannot find any instance of the revival of the usage since the time of Lord Hale. I am not prepared to say, therefore, that a repleader can be awarded.

7th. The latter part of this (the 7th) question has been, in substance, answered by what I have already said upon the 5th, viz., that the other pleas, or the issues found thereon, do not, in my opinion, contain a sufficient confession, or afford sufficient proof whereon to found a judgment for the plaintiffs upon the whole record. The earlier part involves in it the result of the whole inquiry, which is, in my opinion, that the judgment of the Court below ought to be reversed; but inasmuch as there does not appear to be any appropriate issue whereon to sustain the finding of the jury in favour of the defendant, which otherwise would have entitled him to it, I do not think that judgment can be pronounced for him.

Patteson, J.—1st. In answer to the first question proposed by your Lordships, I am of opinion that the conduct of A.B., as therein described, was a breach of the condition of the bond therein mentioned. The words of the condition of that bond are, that he shall "well and truly pay or cause to be paid, unto the

“ receiver general of the said taxes, rates, and duties
 “ for the county of Middlesex, all such sum and sums
 “ of money as shall come to his hands as such collector,
 “ upon the days and at the times by the said acts
 “ appointed for the payment thereof, and according to
 “ the true intent and meaning of the said acts.” The
 intent and meaning of the said acts (amongst other
 things) was, that the monies collected in each year
 should be carried to the account of such year. Now,
 though A.B. paid to the receiver general all the monies
 collected by him in the year in question, yet he did not
 pay the whole to the account of that year; he did not,
 therefore, pay the monies according to the true intent
 and meaning of the acts; he paid them in discharge of
 a debt which he owed in respect of the collection of
 former years, in violation of the intent and meaning of
 the acts; whether with the consent of the receiver general
 or not, seems to be immaterial; and his conduct in so
 doing seems to me to be as much a breach of the con-
 dition of the bond, as if he had applied the monies to
 the payment of any other debt which he owed.

2d. To the second question proposed by your Lord-
 ships I answer, that, in my opinion, it is a defence to an
 action brought by the commissioners on the bond, that
 they did not, before suit, sell and seize the lands and
 goods of A.B., of which they had knowledge.

This is an action against a surety who has entered
 into a bond under the provisions of an act of parliament,
 43 Geo. 3. c. 99. Before entering into that bond, he
 would naturally look at that act, with a view to discover
 the nature of his engagement, the liabilities he was to
 incur, and the means of protection afforded him. He
 would construe the act in the plain and obvious sense

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which its language imports, and surely he would have great reason to complain if a court of law, upon any question of his liability arising, should put a forced and technical construction on that language to his prejudice. He finds that the act, in the 13th section, directs the commissioners, in case of default in the collector, to prosecute, that is, put in suit the bond :—" Provided " always, that no such bond shall be put in suit against " any surety or sureties for any deficiency other than " what shall remain unsatisfied after sale of the lands, " tenements, goods, and chattels of such collector, in " pursuance and by virtue of the directions and powers " given to the respective commissioners by this act." Those directions and powers are contained in the 52d section of the act, which authorizes and empowers (not requires) the commissioners, in case of default, to make sale, in a summary manner, of the collector's lands and goods, wheresoever the same can be discovered and found. The commissioners are not obliged to seize and sell the collector's property; they may put the bond in suit against him without doing so, for he is not within the proviso in the 13th section; yet they may first seize and sell the collector's property, if they please, and may afterwards put the bond in suit against him; and if they do so, it is plain that, as the bond comes within the 8th and 9th William 3. cap. 11. sec. 8, they cannot recover more than what remains due, after deducting the produce of the sale. Now, the proviso in the 13th section was obviously intended to put the surety in a better situation than the collector; but if that proviso be not held to constitute a condition precedent, their situation will be precisely the same; and indeed it seems to me to be impossible to give any effect at all to

that proviso, except by construing it as any unlearned man would do, viz., as a condition precedent. It has been suggested, that the commissioners might exercise their powers under the 52d section for the benefit of the surety, after enforcing the bond against him, and so give effect to the proviso ; but, on examining again the words of the 52d section, it is clear to my mind that the commissioners could not be justified under it in making sale of the collector's property, to satisfy a debt which had been already discharged by the surety, and, as far as the commissioners are concerned, been altogether satisfied. That section empowers the commissioners to seize the collector's property if he shall neglect to pay any sums received by him ; but they are not at once to sell ; they are to give ten days public notice of a meeting, and in case the monies be not paid and satisfied, they are required to sell, to satisfy, and pay into the hands of the receiver general the sums due, with costs and charges, and render the overplus to the owner of the property. It seems to me, that if the surety has paid the monies due before any seizure of the collector's property, it cannot be said that the collector has neglected to pay, so as to authorize the commissioners to seize, within the meaning of that section ; nor, again, if they could seize, and hold a meeting with ten days public notice, could it be said that the monies due were not paid and satisfied, so as to require or empower them to sell ; nor, if they did sell, could they pay the monies into the hands of the receiver general, he having already obtained the amount from the surety. The powers given by that section are, as I apprehend, primarily intended for the benefit of the commissioners in the

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exercise of their public duty; and if they have no longer any public duty to perform, which they have not as soon as the monies due are paid, they have no right to exercise those powers. The benefit to the surety from the exercise of those powers seems to be a secondary object, and arises only from the proviso contained in the 13th section. Without that proviso, the surety could have no right at any time to call for the exercise of those powers for his benefit; and as the terms of that proviso plainly relate only to a sale antecedent to his being sued, I am at a loss to see by what construction of the act he could call for the exercise of those powers after he had paid the money.

3d. The third question proposed by your Lordships is one upon which I have entertained much doubt; but I have come to the conclusion that it is a defence to the action, that the commissioners did not seize and sell the lands or goods of the collector, if any such existed, although they had no knowledge of their existence. No words can be found in the act of parliament which require any such knowledge, and there are provisions as to the appointment of collectors, by which the commissioners have the means of knowing whether they are able and sufficient persons. Those provisions, indeed, apply only to the time when the collectors are appointed, and do not give the commissioners any greater facilities for discovering the property of the collectors than any other person may have. It may be said, that if the mere existence of any such property, though unknown, and perhaps concealed, and therefore not seized and sold, were to defeat the remedy against the surety, it is obvious that much opportunity

for collusion and fraud would be afforded, and all attempts to enforce the payment of monies by the surety might be from time to time defeated, without any real neglect on the part of the commissioners; and that it is very reasonable to require, that the party, for whose benefit a seizure and sale are to take place, should give such information to the commissioners as will enable them to make such seizure; or, at all events, should not set up the want of such seizure as a defence, unless he can establish that the commissioners have been guilty of a culpable neglect in not making it. Every act of parliament, as well as any other document, must have a reasonable construction; and I apprehend that such construction ought to prevail as will effectuate the obvious intention of the legislature, provided no violence be done to the language which it has adopted. It may also be said, that the very object and intention of the legislature, in requiring that the collector should find sureties, would be frustrated, if it be held, that the existence of any unknown or concealed property of the collector would defeat the remedy against the surety; at the same time that the benefit intended for the surety might be amply preserved, by requiring the seizure and sale of the known property of the collector, as a condition precedent to his being sued for the monies due. These reasons led me upon a former occasion to entertain the opinion, that knowledge of the existence of such lands and goods was necessarily implied in the proviso which limits the power of suing the surety. I am, however, free to confess, that, after further consideration of the act of parliament, I am not so sure of the intention of the legislature as to feel that I was warranted in entertaining that opinion; and, as it may

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be possible, that, by putting such a construction upon the act, I am altering or adding to it, instead of simply interpreting it, I feel myself bound to abide by the literal meaning of the words, and to hold that the existence of any unsold lands or goods, which the commissioners might have seized and sold, is a bar to the action, whether they knew of them or not.

4th. In answer to the fourth question proposed by your Lordships, I am of opinion that the issue raised by the rejoinder, (if any issue at all be raised,) ought, upon the finding of the jury, to be found for the defendant. In considering the effect of similar pleadings upon a former occasion, I came to the conclusion that the issue, though informal, involved the question of notice. I am free to confess that, upon further consideration, I think that I then came to a wrong conclusion. The replication here asserts that A.B. had no lands of which the plaintiffs had notice; that all the goods of A.B., of which the plaintiffs had notice, were seized and sold, and that A.B. had no other goods of which the plaintiffs had notice. The rejoinder asserts that A.B. had lands which might have been sold, and that all the goods of A.B. which might have been discovered and sold were not seized and sold, and concludes to the country; and the plaintiffs join the similiter. Here is no assertion on the one side and denial on the other. Put the replication and the rejoinder together, and the separate assertions of the plaintiffs and defendant will be found jointly to amount to this: that A.B. had lands and goods which might have been sold, but of which the plaintiffs had no notice. The plaintiffs have not denied the existence of lands and other goods besides those sold simpliciter, but only the existence of

lands and other goods of which they had notice. The defendant has not asserted the existence of lands and other goods simpliciter, but only the existence of lands and other goods which might have been sold. The replication relates to lands and goods of A.B. in a particular condition or predicament; the rejoinder relates to lands and goods of A.B. in another and different condition or predicament. The more I consider the matter, the more satisfied I feel that no issue at all is raised by the rejoinder; neither an informal issue, which would be cured by verdict, nor an immaterial one, which cannot now be cured at all. But if any issue be raised, I think that it must be an issue in the words used by the defendant in his rejoinder, which concludes to the country, and which do not involve the question of notice; and if it be an issue in those words, it ought to be found for the defendant.

5th. The fifth question proposed by your Lordships is one which, according to my view of it, is of very general importance, as a question of pleading. It involves the consideration whether any pleading which concludes to the country, except, perhaps, the anomalous statutable plea of bankruptcy, contains any confession of the matters stated in the previous pleading, and not denied.

Here I take the issue, if any there be, as I have already stated, to be in the words of the rejoinder, and to be an immaterial issue, for want of involving the question of notice; assuming always, as this question does, that notice is material. Still, as the rejoinder concludes to the country, and tenders an issue, it must be taken to traverse the whole or some part of the replication. Clearly it does not traverse the whole; it

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omits that part of the replication which relates to notice, and traverses the seizure and sale of all the lands and goods which might have been seized and sold. Now, the distinction between pleadings by way of traverse and pleadings by way of confession and avoidance is familiar to all lawyers, and it is the latter only upon which questions of this sort have hitherto arisen. One of the last cases on this subject is that of *Gale v. Capern*, 1 Adol. and El. 102, in which the defendant pleaded, by way of set off, a promissory note alleged to have been made by the plaintiff to a third person, and by him indorsed to the defendant; the plaintiff replied, that the said supposed debt on the said promissory note did not arise within six years. It was contended that this replication was no confession of the making and indorsing of the note; that it was not only a denial of its having been made and indorsed within six years, but that it was ever made and indorsed. The court, however, held otherwise, and considered the replication as a pleading by way of confession and avoidance, and not by way of traverse. The replication there concluded, as it of necessity must, to the court, because it introduced new matter. The case of *Lambert v. Taylor*, 4 B. and C. 138, does not go to the same length. Indeed, in the judgment there delivered by Lord Tenterden, it is admitted, for the purposes of the cause, that the plea of the statute of limitations, as generally pleaded, does not admit a cause of action. Unquestionably, for the purposes of trial, a traverse of one out of several allegations in the preceding pleading admits the facts stated in the other allegations, and renders it unnecessary to adduce any evidence in support of them, and so far it is an implied confession of them; yet it seems to

be only a confession sub modo, and not an absolute confession, as all pleadings are which go on to attempt an avoidance. I have always understood that judgment non obstante veredicto is only to be allowed in a very clear case, where the defence set up is good in form and true in fact, but insufficient in law; and so the pleadings show that the defendant has no defence upon the merits, in any way of putting his case. Now, that is by no means the result where the plaintiff has averred some fact amongst others, showing together a sufficient cause of action; but which fact, being separately traversed, turns out to be immaterial. In such a case, how can it be said, that if the traverse had been properly taken, the jury might not still have found for the defendant? For I am not now considering the effect of any special finding of the jury, but, simply, of their finding in the of words the issue; besides which, there is in this case a good plea, containing an averment of notice, and that plea is not disproved in any material part of it; for the issue which arises out of it is, by the hypothesis, immaterial. Unless, therefore, the averment of notice be treated as struck out of that plea, and so the plea be rendered bad, the plaintiffs cannot have judgment non obstante veredicto. Now, the dropping of that averment in the rejoinder can, at the most, amount only to a departure in pleading, which makes the rejoinder bad; it cannot have the effect of striking out that averment from the plea itself. In a very late case, in the Court of Exchequer, the distinction between judgment non obstante veredicto and a replender was much considered; I allude to the case of *Plummer v. Lee*. That was an action of debt on an award by an administratrix; the declaration stated, that, on the 12th of July 1833, a

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settlement of part of the accounts took place between the deceased and the defendant; it then stated a submission to arbitration by the plaintiff as administratrix and the defendant, and an award. The first plea traversed the making of an award; the second traversed that the settlement took place on the day mentioned in the declaration; the third traversed the making of such settlement at any time. On the trial the plaintiff had a verdict on the first and third issues, the defendant on the second. After argument, and time taken to consider, the Court held that the second plea did not contain any confession, and that judgment non obstante veredicto could not be given, but awarded a repleader. This case appears to me to be a direct authority to show, that the traverse of an immaterial allegation is not to be taken as an absolute confession of the other allegations in any pleading. Upon the whole, therefore, I am of opinion that the verdict cannot be entered for the plaintiffs on an implied confession in the rejoinder.

6th. In answer to the sixth question, I am of opinion, that a repleader ought to have been awarded, in the case stated, by the Court below. I think, however, that a court of error cannot so award. Lord Chief Justice Hale expressly states, that in his time the practice of awarding a repleader in the Court of King's Bench, upon error from the Common Pleas, was obsolete, and not in use; *Bennet v. Holbeck*; and so it has been laid down in our books of practice ever since. Upon a writ of error the parties are not before the Court upon a day given, and though a practice may have prevailed in ancient times for the Court of King's Bench to award a repleader, into which Court the record itself was always removed from other courts on a

writ of error, and became a record of the King's Bench, yet it does not appear that any such practice ever prevailed in the House of Lords; nor, I believe, is any instance known in which parties have pleaded before the House of Lords, or in which that House has ever issued jury process, or given any judgment except on a writ of error brought. Yet such must be the consequence, if a repleader be awarded in the case supposed by the sixth question, unless, indeed, the transcript of the record be remitted to the Court in which the original pleadings took place, with a direction that the parties should replead before that Court; a course of proceeding for which no precedent can, I believe, be found.

7th. The seventh question proposed by your Lordships raises a considerable difficulty. In answer to it I am of opinion, that if there be but one issue on the record, and that be an immaterial issue, of such a nature that the Court below ought to have awarded a repleader, but has in fact given judgment for one of the parties, a court of error ought, simply, to reverse such judgment, without giving any judgment in favour of the other party; but where there are several pleas, some or one of which, or the issues found thereon, contain a sufficient confession, or afford sufficient proof wherein to found a judgment for the plaintiff,—whether the immaterial issue on the other plea shall thereby be aided, is a matter of some nicety.

No authority can, of course, be found upon this subject in the older reports before the statute of Anne, which introduced several pleas; nor have I been able to find any direct authority since that time, except the case of *Goodburne v. Bowman*. In that case the rule, that, in considering the merits or demerits of one plea, re-

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such knowledge before the commencement of the action, the existence of such lands and goods within their jurisdiction is not a defence, for the proviso must receive a reasonable construction. The thirteenth section directs the commissioners to prosecute if the collector makes default; which direction is followed by a proviso, that the bond shall not be put in suit for any deficiency other than such as shall remain after sale of the lands and goods of the defaulter. But if the commissioners have no knowledge of such lands or goods, they are bound by the directions of the statute to prosecute. The legislature cannot, with reason, be supposed to intend that the commissioners should delay the commencement of a prosecution against the sureties until they have ascertained, by all possible means, whether the collector is possessed of any lands or goods, and that if, after such suit commenced, any, the smallest portion, of the property shall be discovered, a suit honestly commenced, pursuant to the direction of the statute, shall be defeated by a plea of the existence of such minute amount of property within their jurisdiction. Possibly, if the existence of property were communicated to the commissioners after action brought, proceedings against the surety might be stayed until the property had been sold, and the deficiency ascertained; but whatever might be the effect of an application for a stay of proceedings, the question now is, whether the proviso creates an unqualified condition precedent, or only a condition qualified by knowledge of the commissioners? And I cannot think that it was intended, by the introduction of this proviso, to render it impossible for the commissioners with any safety to comply with the directions to prosecute.

It has been suggested, as an objection to this construction, that, if by notice to the commissioners is meant notice to all the commissioners, it would be next to impossible to comply with such condition, considering the great number of persons who fill that character; and that, if notice to less than all be sufficient, a notice to one who may have no knowledge of the bond would be sufficient to defeat an action duly commenced by the obligees. But, in putting what I think a necessary limitation on the words of the statute, to prevent unreasonable consequences, I do not feel myself driven to adopt a condition, the compliance with which would be either impracticable or nugatory.

The commissioners are directed to appoint a clerk, and any two commissioners may act. There can be no doubt that notice to such clerk would be sufficient; so likewise would notice to the obligees in the bond, or to either of them, or to either of the commissioners who direct the bond to be put in suit in the name of the obligees. But I neither think that notice to all the commissioners is necessary, nor that notice to a person who, though a commissioner, does not act as such, would be sufficient to constitute a defence. The notice of which the necessity is brought into question upon the pleadings in this case is a notice to the plaintiffs, the obligees in the bond, previous to their commencement of the action; and I think that, whatever would amount to notice to them, would be sufficient, but nothing less.

4th. I think that the issue joined on the fifth plea ought to be entered for the defendant. The issue tendered by him, viz., that there were lands and goods of A. B. within the jurisdiction, has been found in his favour.

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The notice, which is negatived by the finding, forms no part of the issue, nor the allegation that the commissioners could and ought to have sold, which is an inference of law.

5th. Supposing the verdict to be entered for the defendant on the said issue, and supposing it is not a defence to the action, that the lands and goods of A. B. were not sold by the commissioners, unless they had notice (meaning knowledge) of their existence, still I think that the judgment cannot be entered for the plaintiffs non obstante veredicto, on an implied confession in the rejoinder that if there were lands and goods the commissioners had no notice of their existence. The plea alleges that A. B. was possessed of divers lands and goods of which the plaintiff had notice, and which might have been seized and sold, but which lands and goods then continued unsold. The replication avers that there were no lands which the commissioners could seize and sell, of which they had notice, and that they had seized all the goods and chattels of which they had notice. It admits the existence of some property, and that the commissioners had notice of it, but insists upon the sale of all the property of which they had notice; notice of unsold property is therefore alleged on the one side, and the want of notice of any property unsold is asserted on the other. The frame of the replication clearly invited the defendant to take issue in the terms of it, by which the sale of all the property known to the commissioners would have been denied; but the defendant, by his rejoinder, avoided such denial, departed from the good defence set up by his plea, and chose to rely on the mere existence of property within the jurisdiction as a new ground of defence. Nevertheless,

I cannot say that, by omitting to re-assert in his rejoinder the notice which he had alleged in his plea, he has so confessed the want of notice as to authorize a judgment against him, founded on such a confession.

In *Staple v. Haydon* Lord Chief Justice Holt took this difference, that “where the defendant confesses a trespass, and avoids it by such matter as can never be made good by any sort of plea, then in such case judgment shall be given upon the confession, without regard to such immaterial issue; but where the matter of the justification is such a matter as, if it were well pleaded, would be a good justification, there, though it be ill pleaded, yet that shall not be taken to be a confession of the plaintiff’s action;” and he added, “the books do, all of them, if they be narrowly looked into, turn upon this difference,—where the confession is full, and the matter of the plea is ill in substance.”

6th. That, though judgment non obstante veredicto cannot be given upon an implied confession in this plea of want of notice, it does by no means follow that a repleader ought in such a case as this to be awarded. If the fault of the rejoinder had consisted in a defective mode of pleading the matter relied on, some ground might be afforded for a repleader, supposing that proceeding could be awarded after a writ of error; but here the ground taken for the defence in the rejoinder is defective upon the merits, and cannot by any pleading be made available. The defendant having studiously declined to insist upon the notice mentioned in the plea, and chosen to put his defence upon the mere existence of lands and goods within the jurisdiction, could not

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make that defence good by any sort of amendment; his omission to include in his traverse the want of notice was no mistake or mere error in form.

A judgment non obstante veredicto is always upon the merits; a repleader upon the form or manner of pleading; see Tidd's Practice, 953. But whether a repleader ought or ought not to have been awarded in the Court below, it cannot, I apprehend, be awarded by a court of error, according to the express authority of Lord Hale in *Bennett v. Holbeck*; and even if it could, I am humbly of opinion that it ought not to be awarded in this case, since it could have no other effect but that of enabling the defendant to set up some new defence.

7th. The seventh question involves two inquiries: first, whether the pleas and issues contain a sufficient confession, whereon to found a judgment for the plaintiffs, disregarding the immaterial issue; secondly, whether they afford sufficient proof to found such judgment.

I have already stated my opinion, in answer to the fifth question, that the rejoinder to the fifth plea does not contain a sufficient confession of want of notice of unsold property to authorize such a judgment; but, although want of notice be not confessed, still it appears to me that by the same rejoinder the plaintiffs cause of action is confessed, and, consequently, that if it be not sufficiently answered, (which, for the reasons already given, I think it is not,) the plaintiffs are entitled to judgment. The ground of the plaintiffs right to recover is the breach, by Richard Bigg, of the condition of the bond, in neglecting to pay to the receiver general the sums collected for taxes.

The declaration, as usual, states a money bond payable to the plaintiffs on request, in the terms of the

instrument. Oyer of the condition having been had, but no breach then assigned, the defendant in his second plea pleads performance generally, and then in his fifth plea sets up, as a defence to any right to recover on the bond, that Richard Bigg faithfully collected all sums of money from every person charged, and in every case long before the commencement of the action, and from thence continually hitherto was possessed of lands and goods within the jurisdiction of the commissioners, of which the plaintiffs had notice, and which might have been sold, but which were unsold. This appears to me to have been a good plea. The plaintiffs having before, in their replication to the plea of performance, assigned nonpayment to the receiver general as a breach of the condition, proceed, in their replication to the fifth plea, to allege in answer thereto, that after Richard Bigg had collected, and after he had neglected to pay the receiver general, as in their replication to the second plea mentioned, Richard Bigg had no lands which they could sell, of which they had notice, and that all the goods of which they had notice were sold. The effect of this allegation is, that the condition of the bond had been broken, and that there were no lands or goods of Richard Bigg which the commissioners were bound to sell after the breach of the bond had been committed. The defendant, in his rejoinder to this replication, does not merely omit to traverse the neglect to pay to the receiver general, but expressly says, that, after the supposed collection and receipt of the money, and after the supposed omission and neglect to pay the receiver general, Richard Bigg had lands and goods within the jurisdiction which might have been sold, thereby admit-

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ting, as it appears to me, that the condition of the bond had been broken by such nonpayment to the receiver general, and relying on matter insufficient to excuse the defendant from responsibility upon the bond. He that excuses a nonperformance supposes it, *Meredith v. Allen*, 1 Salk. 138.

If this view of the pleadings be correct, then the plaintiffs will be entitled to judgment non obstante veredicto, upon the confession in the rejoinder of the plaintiffs cause of action, notwithstanding the verdict on the immaterial issue.

Had the matter of this rejoinder been originally pleaded as a defence instead of the fifth plea, (supposing such defence to be insufficient in substance,) the plaintiffs, I apprehend, would be entitled to judgment, notwithstanding the verdict formed upon the issue tendered by it, on the ground of the confession of the cause of action which it contains; and if that be so, I can see no reason why the existence upon the record of the plea which has been departed from, and abandoned as the ground of defence, should deprive the plaintiffs of the benefit of this confession.

If the rejoinder to the replication to the fifth plea does not contain such a confession of the plaintiffs cause of action as to entitle them to judgment thereon, I am not aware of any pleading on this record by which it is more distinctly confessed. Supposing, therefore, that no such confession appears, the remaining question will be, whether, notwithstanding the verdict found for the defendant upon the immaterial issue tendered by this rejoinder, the plaintiffs are not entitled to judgment upon the rest of the record?

Before the statute of Anne, which allowed defendants to plead several pleas, a motion for judgment non obstante veredicto could only be founded on the confession contained in the same plea on which the issue arose. "If," as Lord Chief Justice Tindal says, in the case of *Goodburne v. Bowman*, "such plea did not contain a confession, there was no part of the record by which the deficiency could be supplied." If, however, several defences are pleaded, one of which is wholly insufficient, and incapable, by amendment, of being made a good defence, and upon which, therefore, no replender ought to be awarded, and other defences are well pleaded, upon which material issues are joined, and found for the plaintiffs, I do not see any good reason why the plaintiffs should not be allowed to take advantage of the finding upon those issues, in the same manner as they might do if the ineffectual defence had not appeared upon the record. In *Goodburne v. Bowman* the Lord Chief Justice further says, "In the present case there is a verdict on the general issue, which finds that the defendant did publish the libels. And although, in considering the merit or demerit of any individual plea, recourse cannot be had to another, unless expressly referred to by such plea, yet, as the application to enter a verdict is founded on the whole record, by which it appears that the defendants have committed the grievance complained of, and have not shown any sufficient justification, it may be considered, in that point of view, that there is enough to warrant the application." In that case, indeed, the Court thought that the special pleas did sufficiently confess the action, but did not sufficiently avoid it. But if the principle above men-

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tioned be correct, the plaintiff may avail himself of a finding by the jury as well as of a confession of the defendant, notwithstanding a verdict for the defendant upon an immaterial issue, provided a repleader ought not to be awarded; and it must be observed, that the Lord Chief Justice took care to show that the defendant was not in that case entitled to a repleader.

Then, how does this case stand upon the record? The plaintiffs declare upon a bond; oyer is demanded of the condition; the execution of the bond is denied by the defendant, and found for the plaintiffs. Then performance of the condition is pleaded, to which the plaintiffs reply, a breach by nonpayment of money to the receiver general. The defendant in his rejoinder alleges payment, on which an issue (the ninth) is joined, and found for the plaintiff to a certain amount, viz., 693*l*. Fraud and covin in obtaining the bond are pleaded, which are negatived by the jury. Two other pleas are demurred to, upon which judgment is given for the plaintiffs. No material issue, either in law or fact, has been found for the defendant; but an immaterial issue is found for the defendant, arising upon a rejoinder which is defective, not merely in form, but in showing any answer in substance to the plaintiffs right of action, capable of being made good by amendment in form.

If this pleading had not been brought upon the record, the plaintiffs would have been entitled to judgment. Upon what principle, then, are they to be deprived of the benefit of all that has been established in their favour, in consequence of a proceeding which is wholly ineffectual, entitling neither the plaintiffs nor the defen-

dant to judgment ; and why may not such a proceeding be disregarded, as altogether nugatory ? Authority upon the subject is not to be looked for in the older books, since no such case can have arisen before the statute of Anne, already referred to. The only modern case upon the point, of which I am aware, is that of *Goodburne v. Bowman* ; the principle to be collected from which is, that where a verdict is found upon an immaterial issue, in a case which does not authorize the award of a repleader, and the whole cause of action is confessed, or proved upon some other plea or pleas on the same record, the plaintiffs are entitled to judgment.

This case was adverted to in *Plummer v. Lee*, and though the principle is said to have been suggested in *Goodburne v. Bowman* for the first time, the justice of it is not controverted ; but the case is distinguished from that before the Court, on the ground that in the latter no plea contained a confession of any part of the cause of action, and there was no issue found upon any plea establishing the truth of the whole of it, and a repleader was awarded. The principle promulgated in *Goodburne v. Bowman* appears to me to be consistent with reason and justice. The award of a venire de novo, to try the immaterial issue, would be wholly useless ; and as this is not a case for a repleader, I humbly offer my opinion to your Lordships, (though, certainly, not without hesitation, in consideration of the novelty of the case, and in deference to the opinions entertained, I believe, by my learned brothers,) that judgment may be entered for the plaintiffs upon the whole record, on the ground that the issues found thereon contain sufficient proof whereon to found a judgment for the plaintiffs, disregarding the immaterial issue.

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Parke, B.—My answer to the first question proposed by your Lordships is, that, in the case suggested, the conduct of A. B. was a breach of the condition of the bond, by which he was well and truly to pay to the receiver general all the sums of money collected by him, according to the true intent and meaning of the statutes 43 Geo. 3. c. 99. and 3 Geo. 4. c. 88.

It seems to me that this condition is to be construed precisely in the same way as if another person had been collector for a former year, the appointment being annual; and it could not admit of the least doubt but that it would have been a breach of such a condition, if the money received, instead of having been paid to the receiver general, to the account of the year for which it was received, had been lent to a former collector, to enable him to pay his arrears, although that collector had really so applied it. The question is precisely the same, so far as relates to the breach of the condition of the bond; and the payment to the account of a wrong year is, in effect, an appropriation by A. B. to the payment of his own debt, though, certainly, the damage is not the same, (from the circumstance of this debt being due to the public,) as if he had applied it to the payment of a private debt of his own. It makes, however, a most material difference to the parishioners, who are a fluctuating body, whether the collections of each year are paid to the account of that year or to that of a former year, for which the same person has acted as collector. In the latter case suspicion is lulled, and no inquiry made until the sureties of the former year, or the collector himself, are dead, or insolvent; and the inhabitants of the parish are rendered liable for the arrears due from their predecessors, and have the amount levied

upon them; an evil which might have been avoided if each year's collection had been duly paid, as it ought, to the account of that year.

2d. In answer to the second question proposed, I have humbly to state the same opinion which I did in the Court below, that it is no defence to the action on the bond, that the defaulter had lands and goods within the district, and that the commissioners had knowledge of their existence before the action brought, and did not, before suit, seize and sell them.

This question depends entirely on the proper construction to be put on the 43 Geo. 3. cap. 99. sec. 13, coupled with other provisions of that statute.

The thirteenth section enacts, that security shall be given by collectors by bond, with sureties, if required by the commissioners, and that "every such bond given by way of security as aforesaid shall be prosecuted by such commissioners on any failure or default by the collector;" "provided always, that no such bond shall be put in suit against any surety for any deficiency other than what shall remain unsatisfied after sale of the lands and goods of such collector, in pursuance and by virtue of the directions and powers given to the respective commissioners by this act."

These directions and powers are in section fifty-two, which enacts, "that in case of default by a collector in paying the money received by him, the respective commissioners, or any two of them, in their respective jurisdictions, are empowered and authorized (not required) to imprison his person, and seize and secure the estates, both real and personal, belonging to him, or which shall descend and come to the hands or possession of his heirs, executors, or administrators,

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“ wheresoever the same can be discovered or found;
“ and the commissioners who shall seize and secure the
“ estates shall appoint a time for a meeting of all the
“ commissioners, who are empowered and required to
“ sell and dispose of the collector’s estate, to satisfy the
“ arrears and costs, if the collector does not pay.”
These being the material provisions of the statute, it seems to me that, according to their true construction, it is discretionary in the commissioners whether they will seize or not; and that if they do not choose to seize, they may put the bond in suit, and that the proviso does not operate unless they do seize; and, secondly, that if the proviso be obligatory on the commissioners in all cases, it does not constitute a condition precedent, but is directory only.

The fifty-second section, of which I have stated the substance, appears to me to leave it clearly in the discretion of the commissioners whether they will seize the estate or not. They have the power of determining whether it is worth while, considering the nature of the property, its probable value, and the difficulty and expense of obtaining and converting it, to put in force the power of seizure.

The proviso, therefore, in the thirteenth section, which expressly refers to the directions and powers in the fifty-second section, and which are discretionary, ought to be read just as if the former section had provided, that the bond should not be put in suit for any deficiency other than such as remained after sale of the estate, real and personal, pursuant to the discretionary power in the commissioners; that is, “ if the commissioners should
“ think fit, in their discretion, to seize the estate, real and
“ personal.” If this is not done, this consequence will

follow: that the commissioners, who have a discretion by the fifty-second section, and that, no doubt, for the benefit of the parish at large, and the public, and all persons interested, to seize or not, are yet compellable to do so, under the penalty of not being able to sue on the bond for the deficiency if they do not so;—that if they, in their discretion, think the public interest and the interests of all best consulted by not incurring the expense of a seizure of property of no value, the public must suffer, by losing the remedy on the bond against the sureties, for it is in truth their loss. If the commissioners took this bond, and were acting for their own benefit, there might be some reason for saying, that if they did not choose first to take the estates of the principal, they should not sue the surety; but if they act, as they do not, for themselves, but for the public, it appears to be impossible to preserve the discretion given by the fifty-second section, without qualifying the thirteenth section, and making the proviso therein a contingent direction or order not to sue, if the discretion should be exercised, until the sale should have been completed. I am, therefore, of opinion, that this proviso in the thirteenth section has no operation, unless the commissioners choose to seize under the powers of the fifty-second section. But if this construction be not correct, and the proviso is obligatory on the commissioners in all cases, then arises the other question: Is the compliance with the enactment a condition precedent, and the non-compliance a bar to the action? I must say, I am of opinion that it is not. In the first place the language of the proviso is not, that no action shall lie or be maintained on the bond, but it comes by way of qualification on the former part of the clause, which commands the

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defaulter, of the existence of which they had no knowledge, before the commencement of the suit.

4th. To the fourth of your Lordships questions my answer is, that, in the case supposed, the verdict ought to be entered on the issue raised by the rejoinder for the defendant. The plea is, in substance, (in so far as it is material to state it,) that the collector performed so much of the condition of the bond as relates to the receiving all the monies assessed from the person liable; and as to his deficiency in accounting for what he received, that he was possessed of and entitled to divers lands and goods, as of his own property, within the jurisdiction of the commissioners, of which the plaintiffs had notice, and which lands and goods still remain unsold.

The replication to this plea is, that the collector, after this breach of the condition, had no lands within their jurisdiction, which they could seize and sell, of which they had notice.

The rejoinder drops all mention of the notice, and simply avers that there were lands which they could and might have seized and sold, and concludes to the country, and the plaintiffs add the similiter. I think this issue was, for reasons I shall afterwards give, wholly immaterial, or rather, in reality, no issue at all; and if a court of error had a power to award a replender, it ought to award it. I think the jury ought, upon the fact found, which is, that there were lands which the commissioners could have seized and sold, to have found for the defendant; for that is the averment which he makes, and which is put in issue.

5th. But, supposing the verdict to be so entered,

then, upon the supposition contained in your Lordships fifth question, I am of opinion that this was an immaterial issue, upon which a replader ought to have been awarded, (confining my opinion at present to the question on the 5th plea, and the pleadings arising out of it,) if the court of error had power to do so, but that judgment non obstante veredicto cannot be entered for the plaintiff.

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The principle upon which such a judgment proceeds, as against a defendant, is, that he has confessed the plaintiff's action, and avoided it by matter which is, in substance, no answer to the plaintiff's action; and in such a case, although the issue raised upon that matter has been found for the defendant, yet the court gives judgment for the plaintiffs as upon a confession. There are four descriptions of judgments for a plaintiff,—on verdict, demurrer, nil dicit, and confession; *Rex v. Philips, Strange, 395*; and this belongs to the last, and is classed under that head, and all the cases in the books, which I have been able to find, are founded on that principle. Thus, in the form referred to by my brother Coltman, 14 Viner, title Judgment, D. pl. 1, the judgment proceeds upon the confession in the plea of the matters in the declaration, and want of sufficient matter in bar: the same in *Carthew, 372*; 2 Roll's Abridgment, 99, Willes, 365, 366. The cases, *Lacy v. Reynolds, Croke, Elizabeth, 214*; the *King v. Philips, Strange, 394*; *Drayton v. Dale, 2 B. and C. 293*; *Earl of Lonsdale v. Nelson, 2 B. and C. 312*; *Lambert v. Taylor, 4 B. & C. 138*; *Clears v. Stevens, 8 Taunt. 413*; *Lewis v. Clement, 3 B. and A. 704*; and *Rickards v. Bennett, 1 B. and C. 223*, are all cases of judgment

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on pleas in confession and avoidance, bad in substance (for if bad in form merely, such a judgment will not be given; *Staple v. Heydon*); and after a very diligent search, I have not been able to discover a single case of this species of judgment, or any other plea than those which are, technically, in confession and avoidance.

But it is said, that if a plea traverses one out of several matters alleged in the declaration, it confesses the remainder to be true, and, in like manner, the rejoinder confesses such part of the replication as it does not deny; but I do not think it confesses the remainder, in the sense which is required to found such a judgment; *Hudson v. Jones*, 1 Salk. 91. That which is traversable and not traversed may be said, no doubt, to be admitted for some purpose; that is, it cannot be made a matter in dispute on the trial; and if it were taken by protestation, under the form of pleading before the new rules, the matter would have been equally put out of the issue, but there would have been great difficulty in maintaining that this was a confession, for the purpose of giving the plaintiffs judgment. The effect of a traverse of one fact out of many is merely this: that the party pleading rests his defence on a denial of that fact only; but if the decision of it in favour of the defendant turns out to be immaterial, I conceive the Court cannot give judgment as on a confession of the other facts. I am fortified in this opinion, not merely by the absence of any authority to warrant such a judgment, but by some cases of a similar nature, in which the Courts have decided that a replender ought to be awarded; for, if the position be true that a defendant confesses that fact,

in a declaration or replication, which he does not deny, it must be equally true of a plaintiff denying one matter which is immaterial, out of several matters in a good plea; and yet in this case Lord Holt says, in *Pitts v. Polehampton*, and in the same case in Lord Raymond, 391, there must be a repleader. In *Sergeant v. Fairfax*, 1 Levin, 32, and 1 Keble, 23, which was an action of debt for rent against the assignee of the lessee, (as it seems from the latter report,) the plea was, that the defendant assigned over to a stranger, with the consent of the plaintiff; and the issue was on the consent, and after verdict, (whether for the plaintiff or defendant is uncertain,) a repleader was awarded. The case is reported several times in Keble, and this appears to be the result. But I must own that no great weight ought to be attached to this authority, from the inaccurate mode in which it appears to have been reported. In a recent case in the Exchequer, *Plummer v. Lee*, the Court decided that where the defendant traversed an immaterial averment, there could not be judgment non obstante veredicto, but that there must be a repleader.

For these reasons I cannot help thinking, that if the replication in this case had averred two distinct facts, and the rejoinder had traversed one, which was immaterial and was found for the defendant, it would not have admitted the other, so as to warrant judgment non obstante veredicto. But even if it were so, the doctrine would not apply to such a case as this; for here, in truth, the issue is immaterial,—one on which no judgment can be given, not because an immaterial fact is traversed, but because there is in reality no issue at

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all,—no affirmance on one side of the same proposition which is denied by the other; and the case belongs to a numerous class of immaterial issues, which are to be found in the books, where issue is taken by one party on that which is not alleged by the other. I would instance the cases of *Enys v. Mohun*, *Strange*, 847, 1 *Barnadiston*, 182, 220, which was an action against the assignee of a lease, to whom the estate of the lessee had come by assignment: plea, that the lessee did not assign to defendant; and after issue joined a repleader was awarded, it being an issue joined on what is not alleged in the declaration; and the cases in *Gilbert*, C. P. 48, *Croke*, *James*, 585, *Walker v. Brook*, 1 *Lord Raym.* 133, all afford instances of the same kind. In the present case the replication is, that the collector had not any lands of which the commissioners had notice, which pleading is bad on special demurrer, as being a negative pregnant; that is, an issue that rather supposes an affirmative than the contrary, but good after verdict; *Gilbert*, C. P. 153. If the replication had been proper, it should either have denied that there were lands, or admitted that there were, and averred that the commissioners had no notice of them; but this informal replication does not deny that there were lands, nor does it admit that there were; but it means, in effect, this: either that there were no lands, or, if there were, that the commissioners had no notice of them. The rejoinder contains no answer to this proposition, but avers, simply, that there were lands; a fact which was never denied by the plaintiffs; and on this ground I am satisfied that this is a purely immaterial issue,—more properly no issue at all,—which is not cured

by verdict, upon which no judgment can be given, and for which, in the Court below, a repleader ought to have been awarded.

6th. In answer to the sixth question proposed by your Lordships I have to state, that, in my opinion, it is not competent for a court of error to award a repleader.

Upon this point we have the express authority of Lord Hale, *Bennett v. Holbeck*, who said that course had been disused then 100 years, and could not be practised. To the same effect is *Crosse v. Bilson*, 6 Mod. 103; and I believe no instance can be found in recent times of such a proceeding. The reason for this, probably, is, that the authority given by the writ of error is confined to giving judgment, whether of reversal, affirmance, or venire de novo, on the existing record, and that the parties are not before them to replead; they have no day in court, and are not necessarily present when the judgment is pronounced. The defendant in error has the means of compelling the plaintiff in error to assign errors by *scire facias quare executionem non*; and the plaintiff in error may oblige the defendant to appear, and join in error, by *scire facias ad audiendum errores*, or the defendant may come freely; but, this done, the record in error does not usually state the presence of both parties when judgment is given; and judgment may certainly be affirmed in the absence of the defendant, as is stated by Mr. Justice Powell in *Staple v. Heydon*. Be this as it may, there is no doubt but a court of error does not now possess this power. If a court of error could award a repleader, I think it ought to do so in this case.

7th. I think the answer to the seventh question pro-

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posed by your Lordships ought to be, that the judgment should be for the plaintiff non obstante veredicto, on the ground that the fifth plea confessed the right of action on the bond, and did not avoid the same by sufficient matter; that is, that the judgment should be affirmed. But if I am wrong in supposing that the sale of the lands was not a condition precedent, then I am of opinion that the judgment for the plaintiffs below ought to be reversed, simply; and they must begin de novo. I do not think that any aid can be lawfully derived from the other pleadings in this case, though I am not prepared to say that it may not in some cases.

It was said in *Goodburne v. Bowman*, and very truly, “that most of the cases in which the question of a repleader was considered were before the statute of Anne, when only one plea could be put on the record; and that if such plea did not contain a confession, there was no part of the record by which the deficiency could be supplied.” The Lord Chief Justice proceeds to state, “that in that case there was a verdict upon the general issue,” and “that, although in considering the merit or demerit of any individual plea recourse cannot be had to another, unless expressly referred to by such plea, yet, as the application to enter the verdict is founded upon the whole record, upon which it appears that the defendants have committed the grievance complained of, and have not shown any sufficient justification, it may be considered that, in this point of view, there was enough to warrant an application for judgment non obstante veredicto, and that no rule was better established than that the court will not grant a repleader unless complete justice could not be answered without

“ It;” and he cites *Symmers v. Regem*, Cowp. 510. This doctrine, so laid down by the Chief Justice, is, I believe, new; at first I felt considerable doubt as to its being well founded, but it is extremely convenient and reasonable, and I am not prepared to say that any valid objection can be made to it, provided it be explained and qualified in the manner I will mention; but, unfortunately, that qualification will exclude the present case. Where it applies, a new mode of entering up the judgment upon the record would be required, treating the issue found for the defendant as immaterial, and proceeding, notwithstanding the verdict on that issue, to give judgment upon the other issue found for the plaintiff. Nor am I satisfied that the doctrine laid down by the Chief Justice would not apply to a case in which the other issues, one or more, being each material and decisive of the whole cause of action, are each found for the plaintiff, although they, severally or together, did not confess or traverse all the material facts alleged in the declaration; for it may be well said, that a repleader is to be granted, to enable the parties to plead properly such a plea as would be decisive of the action; and if they have already done so, under the power given by the statute of Anne, and raised one or more correct issues, each of which would decide the action, and the court may give judgment on the finding on the material issue or issues, such a course is unnecessary; and I am disposed to think, on that ground, after full consideration, that the Court of Exchequer was wrong in awarding a repleader in the case of *Plummer v. Lee*, already referred to, although it would have been rightly awarded if the only plea had been the traverse of the immaterial fact alleged

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in the declaration. But I am of opinion, that this doctrine will not help the plaintiff in this case, because the matter of the fifth plea has never been tried at all by a proper issue. The defendant had liberty to plead that plea, and has a right to all the benefits of it; and if it be good in point of law, (which, for this purpose, I must assume,) he had a right to have the facts properly disposed of by a proper issue. This has not been done. As the issue was found in his favour, he would have a right to ask for a replender if the plea stood alone, and cannot be deprived of that right if it is joined with others. I am, therefore, of opinion, that, assuming the plea to be good, the other pleadings would not help the plaintiff, and the judgment ought to be reversed.

Vaughan, J.—My Lords, I have considered with attention the various questions which, in this complicated case, your Lordships have propounded to the judges, some of which, being “inter apices doctrinæ placitando,” may be expected to provoke much difference of opinion. I have found great difficulty in bringing my mind to a satisfactory conclusion upon some of them, which may cease to be matter of surprise when it is remembered, that, after the most anxious consideration, not only have different judges taken different views of the same questions, but the same judges, after much ruminating, have felt themselves constrained to give different judgments upon the same question, as the case proceeded through its several stages in the Courts below.

1st. To the first question, which appears to be the most easy of solution, I answer, that the conduct of

A. B., under the circumstances stated, in paying over to the receiver general any part of the monies collected by him for the year 1828, to be applied to the service and account of former years, was a direct breach of the condition of the bond; but as the case of a surety has ever been regarded with favour both in courts of law and equity, his liability must be clearly demonstrated. He has executed a bond with a condition, by which he stipulates that on A. B. being appointed collector of the taxes for the district in question, for the year 1828, he will be responsible for his collecting, and well and truly paying over to the receiver general, all such monies as shall come to his hands by virtue of the assessments of that year. True it is that A. B. did faithfully collect all the sums due upon those assessments, and did pay them over to the receiver general, but with a specific appropriation of part, viz. 693*l.*, to the account and service of a former year, for which year the defendant below was not his surety.

Adverting to the provisions of the act 43 Geo. 3. cap. 99. (so often referred to), which creates and defines the obligations and duties of the collector and of his surety, I am of opinion that A. B. thereby incurred a forfeiture of the penalty of the bond. But in looking at the general frame and context of the act of parliament, one cannot fail to observe, that the duties and responsibility of the collector and his surety are several and distinct, expressed in different terms, and depending upon very different provisions. The office of each is an annual office, and in considering the question submitted to us, we must carefully avoid confounding the duties of these respective officers for any one particular year with

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the duties of any prior or subsequent year. It may happen accidentally, but not necessarily, that the collector of the preceding year may also be appointed collector for the subsequent year, and that the surety of the former year may chance to become the surety for the collector of the following year, and so vice versa. The principal, or collector, engages that he will duly collect, and well and truly pay over to the receiver general, all sums received by him, by virtue of the assessments made in the year 1828, to the service and account of that particular year, and the surety becomes responsible for the faithful discharge of this duty; but if, instead of paying over the sums collected in 1828 to the service and account of that year, he directs the same, or any part of them, to be applied to the extinction or liquidation of an arrear which he had suffered to accumulate in any former year, I have no hesitation in declaring that he becomes as much a defaulter, to the extent of such misappropriation, as if he had applied the money to the payment of his own private debt; and pro tanto the parish becomes liable to be re-assessed to make good such deficiency, and may resort to the surety for indemnification to the extent of the default. Whether this conduct of A. B. amounted to a breach of the condition of the bond cannot, in my humble judgment, be tried by a more infallible test than that suggested by Baron Parke, in delivering his judgment in the Court of Exchequer Chamber, wherein he observes, that the condition of the bond is to be construed as if another person, and not A. B., had been collector for a former year; and could it then admit of any doubt that it would be a breach of the condition "to pay well and truly to the receiver general," if the money had been lent by

A. B. to such former collector to enable him to pay his arrears? Although the money had been so applied, it is in effect, for this purpose, an appropriation by A. B. to the payment of his own debt.

To my mind this proposition, involved in the first question, appears so plain, and so directly in unison with the opinions (I believe) of all the judges, (whatever difference may be found to exist in the answers to be returned to some of the subsequent questions,) that I cannot prevail upon myself to waste more of your Lordships valuable time upon the consideration of it.

2d. The second question opens a more extended field of discussion, and is calculated to excite much greater difference of opinion. We are told that A. B., at the time of the supposed breach of the condition of the bond, had certain lands and goods within the jurisdiction of the commissioners, of which they had knowledge before any action brought upon the bond; and we are asked, whether, an action being brought, it would be a defence to that action, that the commissioners did not, before suit, seize and sell the said lands and goods?

The answer to this question seems to depend upon establishing the proposition, that such seizure and sale was a condition precedent, which must be complied with before the surety can be sued; and whether it be such a condition precedent must be determined by the true construction of the proviso in the thirteenth section of 43 Geo. 3., regard being had at the same time to the power and authority given to the commissioners, by the fifty-second section, to deal with the person and property of the collector making default. It has been

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argued, and I think correctly, that the clause enabling the commissioners to seize the lands and goods of the collector is not imperative, but directory only, and is not a step necessarily preliminary to putting the bond in suit against the principal; but I conceive that the legislature has drawn a distinction, and expressed it in words too plain to be mistaken, between the liability of the principal and of the surety, and has, with the most guarded caution, placed the responsibility of the latter upon the more favoured footing. After directing the form of the bond to be taken from the surety, that section proceeds to enact, that “every such bond given by way
“of security shall be prosecuted by the commissioners
“on any failure or default of the collector,” but accompanied, and followed, by this remarkable proviso, which I regard as the inducement or consideration influencing the mind of the surety to enter into the obligation; viz,
“provided always, that no such bond shall be put in
“suit against any surety for any deficiency other than
“what shall remain unsatisfied after the sale of the
“lands, tenements, and chattels of such collectors,
“in pursuance of and by virtue of the directions and
“powers given by this act.” If this proviso, admitted on all hands to have been introduced for the sole purpose of giving protection to the surety, and of easing the burthen of his obligation, does not disarm the commissioners of any power to call him to account until the deficiency of the collector has been ascertained, after giving credit for the proceeds resulting from the sale of his lands and goods, pursuant to the powers in the fifth section, in reduction of the balance, I ask, what language could be devised more clear to convey the notion of a strict condition precedent than the words of this

proviso? To my mind this is a solemn declaration made by the legislature, (contemplating the reluctance with which persons might become sureties in bonds of this description,) that whoever executed them should not be prosecuted for the default of the collector until after the commissioners had first seized and sold all the real and personal estate of the collector, of which they had any knowledge, and, having given credit for the proceeds in reduction of the debt, might then, and then only, enforce the bond against the surety. How far the neglect or failure of the commissioners to exercise the powers delegated to them, of proceeding against the lands and goods of the principal, for the purpose of making them available in diminution of the debt or balance to be afterwards claimed against the surety, may render them obnoxious to any proceedings, by mandamus or by suit in equity or otherwise, we are not called upon to discuss; but, surely, their neglect to discharge the trust reposed in them affords no just ground for prematurely accelerating the liability of the surety. So harsh a construction of the proviso in the thirteenth section would be fraught with injustice, and virtually operate as a fraud upon the surety. I am, therefore, of opinion, upon the plain letter of the act of parliament, upon the clear intention of the legislature, to be collected from the whole frame and spirit of its various enactments, and upon the reason of the thing, that the neglect of the commissioners to seize and sell the lands and goods of the collector, of which they had knowledge, before the action was commenced, would, if properly pleaded, afford a good ground of defence to such action.

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3d. To the third question, which assumes the want of knowledge in the commissioners, and their ignorance of the fact of the existence of any lands or goods belonging to the collector within their jurisdiction, before the commencement of the suit, I answer, *de non existentibus et non apparentibus eadem est et ratio et lex*. Upon this short ground, and on this plain and sound principle, I am of opinion that his defence must fail, where the commissioners have had no notice.

4th. The fourth question, whether the issue raised by the rejoinder to the replication to the fifth plea ought to have been found for the plaintiffs or for the defendant, depends upon the matters involved in that issue. If the rejoinder, not having traversed the fact of notice to the commissioners, (a most important part of the issue tendered by the replication,) can be considered as having the legal effect of impliedly admitting the want of notice to the commissioners of there being any lands, &c. of A. B. within their jurisdiction, before the commencement of the action, I think that the verdict on that issue should have been found for the plaintiffs. But I cannot satisfy my mind, that the defendant below, by his rejoinder, can be taken to have made any such admission. The allegation in the replication, that the commissioners sold all the lands of A. B. of which they had notice, is one entire and substantive allegation, the whole of which the defendant might and ought to have traversed, but, by omitting one very essential part of it, he has thereby raised an immaterial issue, (if any issue be raised,) in which I think the fact of notice not involved. Taking this

view of the subject, the finding of the jury, that A. B. had lands, &c., properly affirms all that was put in issue, and, therefore, entitles the defendant to have it entered in his favour; but, as it is an immaterial issue, what are the legal consequences resulting from such finding of the jury will be seen in the answer to the subsequent questions.

5th. To the fifth question, if I am correct in supposing that the verdict should be entered for the defendant, upon the issue raised by the rejoinder to the fifth plea, and that it would be no defence to the action, that the lands of A. B. were not sold by the commissioners, unless they had notice of their existence, I think that judgment might be entered for the plaintiffs non obstante veredicto, provided the fifth plea can be considered as amounting to a confession of the cause of action, and an insufficient avoidance of it. The rule, as applicable to cases of this description, is laid down with great precision and perspicuity by Lord Chief Justice Abbott, in *Lambert v. Taylor*. He says, the plea being bad, the defendant certainly cannot have judgment, although the issue is found for him, the issue being taken on an immaterial matter; and the question, whether the plaintiff can have judgment, or whether there ought to be a repleader, (supposing the court competent to award a repleader,) depends upon the question, whether the plea does or does not contain a confession of a cause of action. If a cause of action be confessed by the plea, and the matter pleaded in avoidance be insufficient, the plaintiff is entitled to judgment, notwithstanding the verdict. The same rule was recognized, and confirmed, by the Court of Common Pleas in the case of *Goodburne v.*

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Bowman, and by the Court of Exchequer in Plummer v. Lee.

Let us apply this test: the fifth plea states, that A. B. did well and faithfully demand and collect all the sums of money charged in the said assessments, and then avers that he was possessed of and entitled to certain lands within the jurisdiction of the commissioners, of which the plaintiffs had notice, and which they might have seized and sold, to satisfy the sums so collected and detained, and not duly paid over by him in pursuance of his bond. This plea confesses a cause of action, and contains matter in avoidance of it, capable of being moulded into an issue, which, properly framed, would have determined the merits of the case. But mark the mode in which the plaintiffs deal with this plea in their replication: they state, that, after A. B. had collected the sums assessed, and omitted to pay them over to the receiver general, he had no lands within the jurisdiction of the commissioners which they could seize and sell, of which the plaintiffs had notice.

Without discussing the question, whether the plaintiffs replication was not inartificially drawn, and open to a special demurrer, inasmuch as it traverses, not the single fact, whether A. B. had lands within the jurisdiction of the commissioners, nor the fact, simpliciter, whether the plaintiffs had notice, but the compound proposition, that he had no lands whereof the plaintiffs had notice, perhaps the more correct mode of replying to a plea so framed would have been, either to have traversed the fact of A. B. having lands, or the fact of the plaintiffs having had notice; the one or the other, but

not both; the failure to maintain either being fatal to the defendant's bar. Such being the plea and the replication, the defendant rejoins, that A. B. had lands within the jurisdiction, omitting to traverse so essential a part of the issue tendered by the replication as the fact of notice.

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It appears to me, that the plaintiffs might have demurred to this rejoinder, as tendering an immaterial issue, (if not amounting to a departure,) passing by and losing sight altogether of the fact of notice, upon which the strength and sufficiency of the bar rested. Instead of doing so they have countenanced this error, and concurred, by adding the similiter, in sending an issue to be tried by a jury, which cannot dispose of the merits of the case. How, then, is the verdict to be entered on this issue?

With unfeigned deference to the opinion of others, I conceive, as I have before stated, that the verdict should be entered for the defendant, the jury having found the only fact involved in it in his favour, viz., that A. B. had lands within the jurisdiction of the commissioners.

There being, therefore, a plea upon the record which confesses a cause of action, and which contains matter in avoidance of it, which might have determined the rights of the parties, but which has failed to do so, from their mutual neglect to observe the rules of good pleading, I think the plaintiffs are not entitled to enter up judgment non obstante veredicto, upon a supposed implied confession in the rejoinder that, if there were lands within the jurisdiction of the commissioners, the plaintiffs had no notice of them. For the reasons sug-

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gested by my brother Coleridge and the learned Baron Parke, I agree that the neglect of the defendant to traverse the fact of notice does not amount to any such implied admission of it.

6th. Supposing the judgment could not be so entered, and the issue raised by the rejoinder be (as I apprehend it must be) adjudged immaterial, we are called upon to declare our opinions upon the jurisdiction of a court of error to grant a repleader, and upon the expediency of doing so in the case before us. I believe it has been a prevalent notion in Westminster Hall, of late years, that a court of error cannot award a repleader; and the neglect or forbearance to exercise this right, through a long succession of years, is strong evidence against the existence of it, since the statute of Anne, which allowed defendants any number of pleas the court might be pleased to sanction, and since the practice of granting new trials has grown into daily use, the awarding of a repleader, even by the Courts below, has become of rare occurrence, inasmuch as the Court from whence the record issues is likely to render such proceeding unnecessary. In the case of *Bennett v. Holbeck* Lord Hale is reported to have said, that in ancient times it was usual to award a repleader on a writ of error from the Common Pleas to the King's Bench; and that he had searched, and found several rolls, not less than seven in number, (the earliest in the 21 Edward 1, and the latest in the 33 Edward 3,) in which a repleader had been so awarded; but he adds, it was grown obsolete, and not in use at that day. I am not aware that the jurisdiction of a court of error to award a repleader, (assuming it once to have existed,) has ever been

abolished by any legislative enactment, or declared illegal by any judicial decisions. But since the time of Lord Hale more than a century and a half has elapsed, and sunk the practice (if ever it existed) into absolute desuetude, and involved the right in deeper obscurity. I cannot, therefore, venture to affirm the jurisdiction of a court of error to award a repleader, and consequently cannot recommend the expediency of doing so in this case.

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7th. This leads me to the last and the only remaining question, viz., what judgment ought to be pronounced, supposing a court of error cannot or do not award a repleader? To which I answer, in a word, that judgment cannot be pronounced for the defendant, because the issues found for him are immaterial issues; neither, as it appears to me, can judgment be pronounced for the plaintiff on the whole record, or on the 5th plea, non obstante veredicto, for the reasons I have before stated. Deeply regretting the time and cost which have been expended in a fruitless litigation, I come to the conclusion, which I have arrived at after much fluctuation of opinion, with great reluctance, viz., that the judgment of the Court below should be reversed, and the plaintiffs be at liberty to retrace their steps and begin de novo, if they shall be so advised.

Littledale, J.—My Lords, in answer to the first question, I am of opinion, that the conduct of A.B. was a breach of the condition of the bond, for the reasons already given by my brothers.

2d. & 3d. As to the second question and the third question, they are so much connected together, that, with the

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leave of the House, I should propose to give an answer which applies to both.

Two questions arise on the construction of the statute of 43 Geo. 3. cap. 99. The first is, whether the sale of the lands and goods of the collector be a condition precedent to putting the bond in suit against the surety? The second question is, whether, if it be a condition precedent, it applies to all the lands and goods of the collector, or only to those which were known to the commissioners; and I use the term "known," because the word "notice," which occurs in the pleading, sometimes means that knowledge which is acquired by specific information given with a particular object, as in the instance of notice of dishonour of bills of exchange and other cases, but, as applicable to the present case, I mean, by the term known, knowledge, in whatever way it is acquired.

Upon the first of these points, I think the sale of the lands and goods of the collector is a condition precedent to putting the bond in suit. The 13th section, after prescribing the form of the bond of the surety, says, "Every such bond given by way of such security, as aforesaid, shall be prosecuted by the commissioners on any failure or default of the collector;" and then there immediately follows, "Provided always, that no such bond shall be put in suit against any surety for any deficiency, other than what shall remain unsatisfied after sale of the lands, tenements, goods, and chattels of such collector, in pursuance of and by virtue of the directions and powers given by this act." Here, therefore, is a provision that the bonds shall not be put in suit for any deficiency, other than what shall

remain unsatisfied after a particular thing done. It is quite clear, that if the lands and goods have been sold, the bond can only be put in suit for the difference; but if there are lands and goods, and they can be sold by the commissioners under the powers and directions of the act, the meaning of the clause is, that the deficiency must be ascertained first; for, otherwise, it is putting the bond in suit for the whole, when the act says it shall only be so for a deficiency. It is a very reasonable provision for a surety, that he shall not be called upon till all has been got from the collector that can be raised.

But it is necessary to see what are the powers and directions given by the act, by which the deficiency is to be ascertained; they are contained in the 52d section, which enacts, that, if the collector makes default in the particulars enumerated, the commissioners are authorized and empowered to imprison the person, and seize and secure the estate, both real and personal, of the collector, wheresoever the same can be discovered and found; and the commissioners, who shall so seize and secure the estate, shall and they are empowered to appoint a time for a meeting of the commissioners; and the commissioners present at such meeting, in case the accounts of the collector be not delivered, or the money detained by him be not paid, are empowered and required to sell and dispose of all such estates which shall be, for the cause aforesaid, seized and secured. It is said that this clause, as to seizing the estates, is only directory to the commissioners, as they are only authorized and empowered, and not required, to seize, and that this is more strongly shown, because in a subsequent part of the clause they are required to sell, and,

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therefore, a different phraseology is used. There is not the least doubt but that the clause as to seizing is only directory, and only gives a discretion to the commissioners, that if the collector makes default they may seize and secure the estates; and then, if, at the subsequent meeting, the collector does not pay up his deficiency, they are required to sell; which is all very reasonable,—that they shall not be required to sell if he can redeem his estate; and then it is said, that, because the clause to seize is only discretionary with the commissioners, they need not seize unless they think proper; and as the powers and directions as to the seizure and sale of the estates are not, in point of fact, exercised, and need not be so, unless the commissioners think proper, the deficiency, after the exercise of these powers, is out of the question, and does not and need not arise, and the bond may be put in suit without regard to that. But I think not; the 52d clause is as to conduct to be pursued towards the collector, and the commissioners will, no doubt, exercise their discretion as will best accord with the discharge of their duties to the crown, to the parishioners, and the collector; but if they do not think it right to enforce their powers, the sureties are not to suffer by that. The proviso in the 13th section is introduced for the benefit of the surety, and the meaning of it, in my opinion, is, that they are not to be called upon till the commissioners have done all in their power to make the collector pay; and if, for any reason, they omit to do that, they are not to call on the surety.

If it be not a condition precedent, I do not see how the surety can have the benefit of the clause, for, if the surety be compelled to pay the whole, I do not think he

could have a mandamus to the commissioners to seize and sell. Their power is only to seize and sell if the collector has not paid the money; but if the money has been paid by other means, the collector is no longer indebted to the commissioners. Besides, if a mandamus was to go, it must be for the whole direction of the clause; and that is, that the money arising from the sale shall be paid to the receiver general, and then the surety would have to petition the crown to be repaid; and I should doubt whether a court of equity would compel a sale, unless to carry the whole clause into effect, and so as that the surety might petition the crown, when the money had got into the hands of the receiver general. Perhaps the commissioners might, of themselves, sell, in order to relieve the surety. But, besides my doubting the power of the commissioners to sell after they have been paid by the surety, I do not think the surety ought to be put in the situation of having to rely upon what they may be disposed to do.

It is very possible that some inconvenience, and in some cases loss, might arise, if the bond could not be enforced against the surety till the estates are sold, for, certainly, the proceedings under the 52d section must be attended with delay. But I do not think we have any thing to do with that consideration; the question is upon the construction of the act, as it is presented to us. Some distinction was raised in the argument as to the meaning of the words "prosecute" and "put in suit," and that, because the word prosecute in the bond was used without any restriction, the bond might be enforced by action immediately; but I think prosecute and put in suit are synonymous in pleading.

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In a writ the common phraseology is, sued and prosecuted out of the Court, &c.; if the word sued, alone, or prosecuted, alone, was used, it would mean the same thing as in joining the two words; and in the 13th clause the restriction, I think, must be applied as well to the prosecuting the bond as putting it in suit.

3d. The other question is, as to notice or knowledge of the estates and goods; as to which there is more doubt, because there is no such language as notice or knowledge used in the act of parliament; but the construction of the act of parliament must have a reasonable intendment engrafted upon it, arising out of the existing state of things; and I think it can only be intended that the commissioners shall be compellable to seize and sell, for the benefit of the surety, such lands and goods as they know of. It is impossible for them to seize things of which they are ignorant, and it would not be any breach of duty in them not to seize lands of which they had no knowledge. If they were negligent in not taking reasonable means, according to circumstances, to find out the effects, it might furnish some means of proceeding against the commissioners; but as a mere question of construction, whether they were bound, on a condition precedent, to seize that of which they had no knowledge, any acts of negligence or want of attention in that respect could not arise.

I do not think the words "wheresoever the same" can be found" apply to this part of the construction; and I think that means, wherever, locally, they can be found.

The collector might have some small interest in

public works and undertakings, where there are a great number of proprietors, as to which the commissioners would have no means of information; so, also, an estate may have come to him, as heir at law or devisee of a person who died the day before the bond was put in suit, of which the commissioners know nothing; or he might have a small quantity of goods in some obscure room; and many other cases might be put where knowledge of the fact of having lands or goods would be utterly impossible; and then, if knowledge was not made an accompaniment of the property, a very small amount of effects, under circumstances before stated, would prevent the bond being sued upon.

I do not consider that the question of hardship ought to influence my opinion either on one side or the other; but it may be observed that this construction does not seem to impose any great degree of hardship on the surety, because, if he looked after his own interest, a very little exertion would enable him to make himself at least acquainted with the material parts of the property of the collector; and if he is afraid that the commissioners may not be very anxious to get the information themselves, it would be very easy for the surety to give distinct notice of the property to the commissioners. Not that I mean, as I have before stated, that express notice need be given; for, if they have knowledge by any means whatever, that constitutes notice within the meaning of the word notice, as used in these proceedings.

The result of these remarks on the second and third questions is, that, under the circumstances stated in the

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second question, there would be a good defence to the action; and that, under the circumstances stated in the third question, there would not be a good defence to the action.

4th. As to the fourth question, the replication to the fifth plea states, that Bigg had no lands within the jurisdiction of the commissioners which they could seize and sell, of which they had notice; and all the goods and chattels of Bigg within the jurisdiction of the commissioners, and of which the plaintiffs had notice, were seized and sold.

The rejoinder to this replication says, that Bigg had divers lands within the jurisdiction of the commissioners which they could and might have seized and sold, and that all the goods and chattels of Bigg which could and might and ought to have been discovered and found by the commissioners, were not seized and sold in pursuance of the directions and powers given to the commissioners by the said act of parliament, in manner and form as the plaintiffs have above, in that behalf, alleged; and of this the defendant puts himself upon the country.

And the finding of the jury on the issue so tendered is, "And as to the issue twelfthly within joined, the
"jurors say that Bigg had lands or houses to him
"belonging, of the value of 121*l*., which could and
"might have been seized and sold by the commissioners
"in pursuance of and by virtue of the directions and
"powers given to the commissioners by the said act of
"parliament; and that Bigg also had goods and chattels
"to him belonging, of the value of 200*l*., which also they
"could and might have seized and sold in like manner

“ under and by virtue of the provisions of the said
“ act.”

Now, in this part of the finding the issue raised in the rejoinder is found for the defendant. It is very true that the jury also find that the commissioners had not notice of Bigg being possessed of the houses or lands, but they had reasonable grounds for believing that Bigg possessed the said household goods, which might have been seized and sold by them under and by virtue of the provisions of the said act of parliament, and that Bigg absconded; but the other facts found on the special verdict as to this are not put in issue by the rejoinder to the replication to the fifth plea; and the findings as to that do not vary the finding of the issue on the facts alleged, and, therefore, in answer to the fourth question I think the verdict must be entered for the defendant.

5th. To the fifth question, I think the plaintiffs are not entitled to judgment non obstante veredicto. The fifth plea states that Bigg had lands and goods of which the commissioners had notice, and which were subject and liable to be seized and sold, and which might have been seized and sold, but which remained unsold by the commissioners. This plea, in my opinion, is a good answer to the action, unless it be impeached and the effect of it taken away by the subsequent pleadings; it confesses the bond, and avoids the effect of it.

The replication to this plea says, that Bigg had no lands which the commissioners could seize and sell, of which they had notice, and that all the goods of Bigg, of which the commissioners had notice, were seized and sold.

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The rejoinder says, that Bigg had lands which the commissioners might have seized and sold, and that all the goods of Bigg, which could and might and ought to have been discovered and found by the commissioners, were not seized and sold in pursuance of the directions and powers given to the commissioners by the said act of parliament, in manner and form as the plaintiffs have alleged.

Now, the plea being good, and the replication being also a good answer, a material point in dispute is tending towards an issue; but when the defendant comes to rejoin, he drops all about the notice. Now, as notice is a material point, the rejoinder is bad, because it omits to put in issue a material point, and the rejoinder might be demurred to, but they have not demurred; but they have joined issue upon a part which, taken simply of itself, is not sufficient to decide the merits of the case, and may be treated as not altogether immaterial, (because it is material whether Bigg had lands,) but though material in part it is not material to decide the case, but is rather to be treated as insufficient. The cause is tried upon the issue so tendered and joined, and the verdict, if you are to confine it to the very words of the issue, is found for the defendant; but as the plea itself is a good plea, I do not think the subsequent defects in the pleadings are to invalidate the plea to such an extent as to say, that the plaintiff is entitled to a verdict non obstante veredicto. The cases where the plaintiff is entitled to such a benefit are where the plea to the action is insufficient; here the plea is sufficient, but the plaintiffs have not taken care to put that plea, if one may so express it, out of doors.

If the rejoinder could be taken to be a confession of the want of notice, it might be contended that the judgment ought to be entered for the plaintiffs, because, if the defendant has admitted want of notice, then the finding of the jury that Bigg had lands, when coupled with the confession of the defendant that there was no notice, would show that he had no defence. But I do not think it can be taken that the defendant can be taken to have confessed that the commissioners had no notice, for the allegation that Bigg had lands of which the commissioners had notice is one entire allegation, and the notice is not alleged as a substantive thing; and I do not think that the dropping part of an allegation, when the other part by that means becomes immaterial, is to be an admission of what is so dropped.

6th. To the sixth question, I think a court of error cannot award a repleader, for the reasons given by my brothers; if they could award a repleader, I think it would be proper to do so in this case.

7th. To the seventh question, I see nothing to entitle the plaintiff to judgment on the whole record, whatever may be the case as to the other pleadings on the record. I think that as to the seventh question we are confined to the fifth plea, and as I think the fifth plea constitutes a good defence, and, I think, as the plaintiffs had not taken care to get rid of it, but have gone to trial upon an immaterial issue, though the verdict must be entered for the defendant, yet no judgment can be entered upon it for the defendant; and as, for the reasons I have before given, I think the plaintiff is not entitled to a judgment non obstante veredicto, I think

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that the judgment given in the Court below must be reversed.

The case was adjourned till Mr. Baron Gurney could give his opinion. He attended on the same day.

Gurney, B.—My Lords, it appears, by the special verdict to which the first question refers, that A. B. was duly appointed collector of the assessed taxes for the year 1828, and that the plaintiff in error duly entered into a bond, with a condition for payment by A. B., to the receiver general of the taxes, of all the sums collected and received by him, and which came to his hands as collector for the year 1828; but that he did not pay all those sums to the account or service of that year, but a part only, and the residue he paid to the account or service of former years for which he had been collector, for which former years the party in this cause was not surety.

The plain and necessary result from this statement is, that A. B. violated his duty, and that the bond is forfeited. The appointment is for the year 1828. The duty under that appointment is confined to that year. The bond is for the due performance of his duty for that year.

It was his duty to apply the collection of that year to the account and service of that year.

The application of any part of the money collected under the assessments of that year, to cover any deficiency in any former year, is just as much a breach of his duty, and a forfeiture of this bond, as if he had paid the money to any other creditor, or lost it at the gaming table.

The suretiship was for the conduct of the collector in the year 1828, and no other. Neither the collector nor the surety were contemplated in any other character than as collector and surety for that year. The collector for the former year might have been different; the sureties for the former year were different; but these circumstances cannot make any difference in the consideration of this question.

2d. & 3d. The second and third questions are, whether this action can be maintained against the surety until the commissioners shall have sold the lands, goods, and chattels of the collector within their jurisdiction; and your Lordships have propounded questions to the judges, founded upon the different suppositions of the commissioners having and not having notice of that fact.

I am of opinion, that if the collector had goods, lands, and chattels within the jurisdiction of the commissioners, they could not put the bond in suit; and I do not think that their right of action is affected by their knowledge or their ignorance.

The statute 43 George 3. c. 99. s. 13. directs the security to be given by the collectors with the two sureties by a joint and several bond; and every such bond given by way of such security shall be prosecuted by the commissioners on any failure or default of the collector, provided, &c.

If, therefore, the collector has lands, tenements, goods, or chattels, I think that the sale of them by the commissioners is a condition precedent.

This proviso holds out to the persons who become sureties for collectors, that they shall not be resorted to till all the means of payment from the property which

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the collector shall have should have been exhausted; and if that be not fulfilled to the very letter, I think that the surety does not receive the security which is held out to him by this proviso.

I admit that this question of knowledge is not free from difficulty. It may be said, that a fact of which the commissioners are ignorant is the same as a fact that does not exist. The special verdict upon which these questions are founded, however, shows that the ignorance of the commissioners in this instance arose from a want of due diligence, as the jury found that the collector had lands and goods, and that the commissioners had reasonable grounds for believing that he had.

Another observation serves to show that knowledge or ignorance does not enter into this question. If knowledge be necessary, it must be, I apprehend, the knowledge of the two or three commissioners who are the obligees in the bond. The commissioners consist of a large number of persons; it may happen that these two or three persons may be utterly ignorant, whereas 150 others may have entire and perfect knowledge. The act of parliament does not require that the knowledge shall be brought home to the obligees of the bond, nor even to the commissioners, or any of them; and I do not think that that can be superadded. It is the safer and the sounder construction of the act to consider this as an absolute condition precedent.

In discussing this point it has been remarked that the fifty-second section, to which the proviso refers, does not make the proceeding by the commissioners against the collector compulsory; that it merely empowers the com-

missioners to proceed. I have given the fullest consideration to the argument, but it does not appear to me to be satisfactory.

The fifty-second section empowers the commissioners to sell the collector's property.

The thirteenth section, I think, peremptorily requires, that the commissioners shall exercise that power before they resort to the surety.

It may be said that this construction of the statute may materially embarrass the commissioners in prosecuting the sureties of collectors who are defaulters. Undoubtedly it may; but I do not think that violence is to be done to the express words of an act of parliament for the purpose of relieving the commissioners from embarrassment; another act of parliament may be passed, which may be free from ambiguity. These cases of embarrassment, I fear, always arise from neglect of duty; if commissioners did their duty, collectors would not have the opportunity of committing such enormous embezzlements, and their sureties would escape the ruin with which they are sometimes overwhelmed. In the case of *Peppin v. Cooper* it was not necessary to decide this precise point, as the question there made was, whether the goods of another surety must or must not be first sold; but that argument necessarily brought this proviso under the consideration of the Court, and Lord Tenterden, speaking of the collector, says, "whose lands and goods must be sold before proceedings are had upon the bond against the surety."

4th. The answer to the second and third questions includes the answer to this question, that the issue ought to be found for the defendant.

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The view which I have taken of the case renders it almost unnecessary for me to answer the remaining questions.

5th. The answer to the fifth question is included in the answer to the fourth.

6th. In answer to the sixth question, I am of opinion that a repleader cannot be awarded by a court of error. That is laid down by Lord Hale in 2 Saunders 319 a; 170 years have elapsed since, and no instance has occurred from that time to this.

7th. In answer to the seventh question it is only necessary to say, that I think that the judgment for the plaintiff ought to be reversed.

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LORD CHANCELLOR.—Your Lordships, having now heard the opinions of all the learned judges who were present when this case was argued, will perceive that there is a considerable difference of opinion existing among the learned judges, and that the case, therefore, is one of extreme difficulty, and requiring the serious consideration of your Lordships; and after the assistance we have received, I propose to your Lordships to adjourn the further consideration of this case.

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LORD BROUGHAM.—This was an action brought on a bond, in which the present plaintiff in error, the defendant below, was surety for a person of the name of Bigg, who was appointed collector under the 43d George 3. cap. 99., and other acts, which that act consolidated and amended, namely, collector of assessed taxes for the parish of Saint Matthew, Bethnal

Green. The action was brought for recovering the sum of 693*l.*, which was alleged to be due to the receiver general of the county of Middlesex, in consequence of Bigg not having paid in that sum to the account of the year 1828-29, for which it was received and collected by him, but to the account of the year immediately preceding, for which year Gwynne, the plaintiff in error and defendant below, was not surety.

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Many questions arose, both in the Court below and afterwards in the Court of Exchequer Chamber, into which the writ of error passed, which were at last brought by appeal before your Lordships, upon the liability of that surety, and upon the pleadings in the cause. Upon the pleadings in the cause the question did not arise in the Court of Common Pleas, but in the first court of error into which the cause was brought, namely, the Court of Exchequer Chamber. To the action upon the bond various pleas were pleaded, and various issues raised upon the pleadings, to which it is unnecessary that I should in this case call your Lordships attention; but much that I have now to offer will turn upon the question of pleading, and, therefore, to the state of the pleadings it will be my duty afterwards to direct the attention of your Lordships. Suffice it at present to say, that the issues being joined were tried before Mr. Baron Alderson, when questions were put to the jury, to the number of seven, to which questions they returned answers, and upon that, by consent, a general verdict was entered for the plaintiff in error, with leave to move the Court of Common Pleas, in which the action was brought, to set aside that verdict and enter a

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verdict for the penalty of the bond; and that Court being moved, it was agreed that a special case should be taken, to be turned, if necessary, into a special verdict, with a view to carry the question elsewhere, supposing that one or other of the parties should not be satisfied with the judgment of that Court, and was first argued before that Court on a special case, which was afterwards turned into a special verdict.

The Court of Common Pleas, on the argument of that case, were pleased to pronounce judgment for the plaintiffs, the commissioners for the collection of assessed taxes in that parish, the present defendants in error, for the sum of 693*l.*, which, as I have already stated, is that respecting which the question had arisen. Upon that being turned into a special verdict, a writ of error was brought into the Court of Exchequer Chamber, and that Court, after very great difference of opinion, however, finally affirmed the judgment of the Court of Common Pleas. The writ of error, which brings it before your Lordships, was then brought by the defendant in the original proceeding, the plaintiff in error, from the judgment of the Court of Exchequer Chamber affirming the judgment of the Court of Common Pleas; and your Lordships, on hearing this case argued, which it was at great length, and with great learning and ability, had the assistance of nine of the learned judges, including several of those judges who had attended the discussion in the Exchequer Chamber, but, I think, none of those learned judges who had pronounced the judgment originally of the Court of Common Pleas. Those learned judges who attended the argument here differed very materially on some points, in others they concurred;

upon almost all, but not in all, they were of the same opinion, with the exception of some points to which I shall presently call the attention of your Lordships. The result is, that it remains for your Lordships to pronounce judgment, and I certainly feel, in the circumstances I have stated, very considerable anxiety in recommending the judgment about to be submitted to your Lordships; though I think your Lordships will perceive, when I shall have gone through the circumstances of this somewhat singular case, which it will be my duty to do, that there will be no doubt whatever what course your Lordships ought to take.

There were several points made in the Court below which have not been so far relied upon here as to require the consideration of your Lordships, and accordingly on them you put no questions to the learned judges. These related chiefly to the issues on the eighth and eleventh pleas, and the question raised on them was, whether the provisions of the act, regarding the previous examination of the collector by the commissioners, and the hastening his payment of the monies collected to the receiver general, were imperative, so as to constitute the proceedings by the commissioners conditions precedent to their proceeding against the surety, or were only directory. That they were only directory all the judges below, both in the Common Pleas and Exchequer Chamber, appear to have agreed, nor can there be any further doubt upon the point.

We therefore come to the questions which properly now remain for consideration, and the first which presents itself need not detain us long, but it must be

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disposed of before the others, which are mainly in dispute, arise. Was the payment by the collector of 693*l*. (the sum for which the plaintiff has recovered) to the receiver general, not to the account of the year 1828-29, for the service of which year it had come to his hands, but to the account of a former year, during which the defendant was not security, a breach of the condition in the bond? It appears to me very clear, that such payment was not well and truly paying according to the true intent and meaning of the acts. The acts intend and mean, that the money of each year should be carried to the account of that year; but he paid them in discharge of a debt due by him for a former year. The appointment of collector is annual, and I really can see no difference in the construction here and in the case of another person having been collector the former year. Had it been so, and the money been paid to the account of that person's debt, no doubt whatever could have been raised. Here it is paying another debt of the collector himself, and though the public is the creditor in both cases, yet it is the payment of another debt, as much as if it had been owing to another creditor. Accordingly we find all the learned judges are agreed in their opinions upon this point. On this point, too, the judges of the Common Pleas were unanimous.

The next question is one upon which the Court of Common Pleas gave no opinion, and on which all the other judges, with two exceptions, agreed, both those whose assistance we have had and those who dealt with it in the Exchequer Chamber:—"Was the seizure and sale of the collector's lands and goods by the com-

“missioners, a condition precedent to their putting the
 “bond in suit against his surety?” The words of the
 act (the thirteenth section) appear to leave no reason-
 able doubt on this subject. After pointing out the
 manner of giving security, it proceeds to enact “that
 “no such bond shall be put in suit against any surety
 “or sureties for any deficiency, other than what shall
 “remain unsatisfied after the sale of the lands and
 “goods of such collector, in pursuance of the directions
 “and powers given to the respective commissioners by
 “this act.”

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Now, as this, taken by itself, could really leave no doubt that the bond was only to be sued upon for the balance left unpaid after the collector's lands and goods had been seized and sold, and as the only ground upon which a question can be raised is the reference made to the powers given by the act, which are specified in the fifty-second section, it becomes material to consider that section. It empowers and authorizes, but does not require, the imprisonment of the collector's person, and seizure of his estate, real and personal, “wheresoever
 “the same can be discovered and found;” and then it empowers and requires the sale of the property which may have been seized, if the collector shall not have paid before the next meeting. From whence it is contended, that, as the commissioners have a discretion given them to seize, and are duly required to sell what they have seized, they are only forbidden, by the proviso in the thirteenth section, to sue the surety for more than the balance left unsatisfied by the seizure and sale, in case they shall have elected to seize and to sell under the 52d section. But the reason why the seizure is discretionary, and the sale only imperative, is, to give

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the collector the opportunity of redeeming after the seizure. The 52d section relates to the proceedings against the collector, the 13th to those against the surety; and the proviso in the latter appears expressly framed for his benefit. Whoever gives bond for the collector must, on reading the 13th section, perceive that he only becomes bound for what remains unsatisfied after the seizure and sale of the collector's property. To hold that the discretion given by the 52d section of proceeding against the collector imports into the 13th a condition, "in case the commissioners shall choose to seize," would be altering the nature of the proviso, rendering it unavailing to the surety, and placing him in the same situation in which the collector himself is under the statute of William the 3d, and in which the surety would have been, had no proviso been introduced into this act in his favour, although it is plainly the intent of the proviso to place him in a better situation than the collector.

The argument used, that the powers given by the 52d section may be exercised in the surety's favour, after he shall have been compelled to pay the debt, and that a mandamus will lie to compel them to seize and sell, does not appear to have any good foundation. The power given by that section is to seize and sell for the collector's debt; the power given is to seize on his default, and sell for what he has left unpaid. If the payment by the surety is his payment, there is no power to seize and sell, for there is no debt; if the payment by the surety is not his payment, then there may be a debt, and there may be a power to seize; but there is more,—there is an obligation to pay over, just as if the debt subsisted; for the words require a payment, into

the hands of the receiver general, of such sums as have not been accounted for by the collector. So that if the commissioners are compellable to seize and sell because the surety has paid, they are compellable to pay the whole debt into the receiver general's hands, although the surety shall have paid; and then the surety must look to the receiver, without any words whatever giving him such recourse;—a construction which seems wholly untenable. It, therefore, appears sufficiently plain, that the bond cannot be put in suit against the surety, unless and until the commissioners have exercised the power given them against the principal.

Although, where a statutory enactment is clear, there is no occasion to argue from the consequences of a construction, and where it is ambiguous, such an argument is only admissible if it is connected with the general intention of the act, yet we cannot avoid perceiving here, that, unless the commissioners are obliged to seize the collector's goods before suing the surety, they may, and very likely will, proceed against a solvent surety, rather than incur the trouble of seizing and selling; so that the whole benefit plainly intended for the surety will be lost to him.

The next question has given rise to a much greater diversity of opinion; it is, whether the commissioners are bound, before proceeding against the surety, to seize all the collector's lands and goods, or only those of which they have notice; meaning by notice, as is now on all hands agreed, knowledge, however acquired.

The proviso in the 13th section is clear and express,

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that the bond shall not be put in suit for any deficiency other than what shall remain unsatisfied after sale of the lands and goods of the collector, in pursuance of the directions and powers of the act, that is, those given by the 52d section. This sale being, by what has been already shown, a condition precedent, the 13th section must be read as if it provided that the surety shall not be sued until after the lands and goods of the principal shall have been sold, under the powers of the 52d section, which authorizes the seizure and sale of the whole estate, wherever it can be discovered and found. The two sections taken together thus make no exception, and make the sale of all the principal's estate a condition precedent to proceeding against the surety. Have we any right to engraft upon this plain and positive enactment a qualification restricting the condition to such estate only as shall have come to the knowledge of the commissioners? The only words that can be supposed to import any restriction whatever are these: "Wheresoever the same can be discovered and found." But these words only refer to the local situation of the property, and are meant to give a power over the whole, wheresoever situated. They are enabling words,—of enlargement rather than restriction; they import that whatever property can be any where found may be seized. If they are read as they must be to support the argument raised upon them, they must be thus read:—"Wheresoever the property shall be discovered or become known to them," or, rather, "if any such property shall be discovered or become known to them." But how could they seize any which had not become known to them? This is, plainly, an in-

sensible construction, and the words can only refer to the situation; they mean all property, wheresoever found.

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It is not to be denied that the condition of notice may sometimes be implied, where the words of an enactment do not specify it; but this cannot be in cases where the party has no exclusive means of knowledge, or no duty to inquire. The surety may know more about the affairs of the collector than the commissioners, but not necessarily so; nor is there any duty cast upon him more than upon them to become acquainted with the collector's property.

The consequences of a construction which does not hold notice to be necessary form, confessedly, the only ground for maintaining the affirmative of the proposition. It is said, and truly said, that if the commissioners cannot proceed against the surety until all the property of the collector is seized, they may not be safe in proceeding while any unknown parcel of goods exists, or in case any estate, real or personal, has, on the eve of the seizure, come to the collector by descent, devise, or bequest. But nothing can be more dangerous than to make such considerations the ground of construing an enactment, quite complete and unambiguous in itself. If we depart from the plain and obvious meaning on account of such views, we, in truth, do not construe the act, but alter it; we add words to it, or vary the words in which its provisions are couched; we supply a defect which the legislature could easily have supplied, and are really making the law, not interpreting it. This becomes peculiarly improper in dealing with a modern statute, because the extreme conciseness of the ancient statutes was the only ground

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for the sort of legislative interpretation frequently put upon their words, and the prolixity of modern statutes is still more remarkable than the shortness of the old. The only safe rule to go by is to hold, that if the legislature had intended to obviate the consequences apprehended, it would have done so; nothing, confessedly, being more easy than to have added words for confining the condition precedent to the property of which the commissioners had notice.

In considering this point no authorities are to be found, except so far as the dicta of Lord Tenterden and Mr. Justice Holroyd, in *Peppin v. Cook*, certainly favour the literal construction rather than the other. But then no case has been cited, and none can be shown, where, in construing a recent statute, requiring all the things of a certain description to be dealt with by or in a particular way, the courts have held themselves called upon to add the words, "and whereof A. had notice or knowledge." Nothing could justify this but the impossibility of making sense of the provision otherwise. Now here it is not contended that the general meaning of the enactment makes the addition necessary; the statute is very sensible without it. Neither is it necessary for enabling the commissioners to act; they may ascertain the property of the collector at the time of appointing him and accepting his security. They may even inform themselves from time to time of any change in that property; but if they should be unable to do so, and inconvenience should hence arise, still this is no ground for adding to the statutory enactment, because the legislature might easily have provided against it.

But supposing we are agreed that the seizure and

sale is a condition precedent, and that the want of notice is immaterial; in other words, that the surety has a good defence to the action, on the ground that the plaintiffs, the commissioners, had not seized and sold the collector's property;—although it follows from hence that the judgment must be reversed, because it cannot be given for the plaintiffs, it still does not follow that it must be entered for the defendant, or that, in the state of this record, it can be so entered. We must now, therefore, examine the pleadings, with a view to finding whether there be any issue joined between the parties, upon which judgment can be given. For this purpose the fifth plea, and the issue on the replication to that and the rejoinder, need alone be considered, because, the sixth being similar to the fifth, and the seventh and twelfth referring themselves to the fifth and sixth, the whole questions on the pleadings resolve themselves into the question arising on the fifth plea, and the whole four issues, nine, twelve, thirteen, and sixteen, raise only the same question, namely, that arising out of the pleading upon the fifth plea.

The fifth plea is, that the collector, before action brought, and continually hitherto, had lands and goods within the jurisdiction of the commissioners, of which they had notice, and which might have been seized and sold under the act to satisfy the debt of the collector, but that the same have not been so sold by them;—in substance, that the collector had property of which the commissioners had notice, and that they did not seize and sell it. The replication is, that after the default the collector had, within the jurisdiction of the commissioners, no lands of which they had notice, and no goods of which they had notice, other than a certain

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parcel known to them, and which they had seized and sold;—in substance, that the collector had no property subject to seizure and sale, of which the commissioners had notice.

The rejoinder is, that after the default the collector had lands which the commissioners might have seized and sold, and that after the default all the goods of the collector at the time of the default, and which might and ought to have been discovered and found by the commissioners within their jurisdiction, were not seized and sold by them, in pursuance of their powers under the act, in manner and form as alleged by the plaintiff, and it concludes to the country;—in substance, that the collector had lands which might have been sold, and that his goods, which might have been sold, were not sold. And this rejoinder says nothing whatever of notice; the *modo et formâ* clearly referring, not to the substantive matter of the plaintiffs allegation, namely, “goods of which the commissioners had notice,” but only to the manner in which the plaintiffs had made the allegation.

Then the verdict is, that the collector had lands and goods after the default, and until the commencement of the suit; which lands and goods might have been seized and sold by the commissioners under the act before the commencement of the suit; but that the commissioners had no notice of the collector's lands, but had reasonable grounds for believing that he had goods; and as this does not amount to a finding that they knew of the goods, nor, indeed, even to a finding that they believed he had any, it has been treated as a finding that they had no notice of either lands or goods. I am rather disposed to regard it as negating notice of

the lands, and as no finding at all on notice of the goods; but this becomes immaterial, if the notice is immaterial; therefore let it be taken, as it has been taken, to be a finding that they had notice neither of lands nor goods.

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We are now to consider what the issue is upon which this verdict is found, and whether there really is any issue at all. The plea affirmed the existence, not of lands and goods absolutely, but of lands and goods of which the commissioners had notice, and which they might have seized and sold. The replication asserts that there were no seizable and saleable lands and goods of which the commissioners had notice. The rejoinder, without mentioning notice at all, asserts that there were seizable and saleable lands, and that goods, seizable and saleable, were not seized and sold; which, though very inartificially expressed, may be taken, after verdict, to assert what it does not, except inferentially, that the collector had goods, as well as land, seizable and saleable. Now, it is plain that here the parties make their averment of and concerning different things, and not of the same thing; the one pleads respecting property in one predicament, the other respecting, not the same, but property in another predicament. The allegations of the two parties, far from being diametrically opposed to one another, as they must be to raise an issue, are not at all inconsistent with each other. If I say, that all the freehold lands of J. S. in the manor of A. have been sold, and my adversary only says that all the lands of J. S. in the manor of A. have not been sold, he does not negative my assertion. My proposition contained a negative pregnant; indeed the replication would, on the ground, have been demurrable

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pecially. I might have explained or particularized the proposition thus, "all the freeholds have been sold, but all the copyholds remain unsold;" and my adversary might have explained or particularized his proposition in the very same words, so that, instead of one having asserted an affirmative and the other a negative respecting the same matter, which is the character of every issue, both of us would only have been asserting propositions which, far from being opposite, are quite consistent, and might have been identical.

The more this pleading is examined the more plainly it will appear that it raises no issue at all; neither an informal one, which would be cured by the statute after verdict, nor an immaterial one, which could not be so cured;—but no issue whatever; consequently the verdict is a nullity, according to the authorities, *Sandbach v. Turvey*, *Croke, James*, and other cases lay this clearly down; and although cases are cited which seem to throw some doubt on the position, it is to be observed that those are rather cases where there was an issue raised, though an informal issue. One of them, too, *Parker v. Taylor*, in *Croke, Charles*, is said in another case, *Walsingham v. Coombe*, in *Siderfin*, 289, to have been denied, and another of them, *Waltham v. Aldrick*, in *Croke, James*, was decided the very term after *Sandbach v. Turvey*, viz., *Michaelmas*, 17 James 1, and without any reference to the former case, which plainly shows that the two decisions were not regarded as inconsistent. Nothing, indeed, could be more contrary to all principle, nay, to common sense, than to regard a finding upon an issue which had no existence as other than a nullity; the jury must be taken

to have found a verdict upon a matter not before them, as much as if they had given a verdict in another cause.

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The learned judges have all agreed that the verdict on the fifth plea must be entered for the defendant, but none of them hold that the judgment can be entered for the defendant. Upon different reasons they all arrive at this conclusion, as well those who hold the seizure and sale of all property a condition precedent, as those who hold only a seizure and sale of the property known to the commissioners a condition precedent; and much more the learned judge who alone considers the seizure and sale no condition precedent at all, whether with or without notice. I ought to state, that one of the learned judges only whose assistance your Lordships had, Mr. Baron Parke, took that view of the case, that a seizure and sale was not a condition precedent, with or without notice. He was the only learned judge here who held that proposition; but one learned judge in the Court of Exchequer concurred with him in that opinion, namely, my Lord Abinger. All the other judges, in the Court of Exchequer Chamber as well as here, took a different view. The whole of the learned judges, therefore, whose opinions have been given in answer to the questions put, are agreed, that there can, in no view, be judgment for the defendant upon the issues which these pleadings raise, but that, if judgment be not entered for the plaintiffs, there must be a simple reversal, and they must begin again, should they be so advised. A replender would have been awarded in the Common Pleas, had the points on the pleadings been made there; but it is agreed, on all hands, that a court of error cannot award a replender.

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The only grounds upon which judgment could be given for the plaintiff are two: either that it may be given non obstante veredicto, on an implied confession in the rejoinder, or that, upon matter disclosed in the other parts of the record, it may be given, disregarding the immaterial issue. But all the learned judges hold that judgment non obstante veredicto cannot be given on an implied confession in the rejoinder that, if there were lands and goods, the commissioners had no notice of them; and surely the mere dropping all mention of notice,—the merely not re-asserting in the rejoinder the notice which he had asserted in his plea, cannot be taken as a confession of want of notice, entitling the plaintiff to judgment. The case on this point stands thus: the plea is good, even if notice be supposed necessary; the replication meets the plea on this ground, and, therefore, answers it sufficiently; the rejoinder, dropping all mention of notice, is bad, on the supposition that notice is necessary, and is demurrable, but they have not demurred. But then it contains no confession; the mere leaving out notice—the not averring notice does not confess it. The averment in the replication was not substantive, that the commissioners had notice; but the notice was part of one entire allegation, and the omitting a part, which was essential to its materiality, and so leaving what was least immaterial, cannot be taken as a confession of the thing omitted; therefore, even supposing notice material and necessary, the plaintiffs could not have judgment on this ground.

Even supposing notice necessary, the plaintiffs cannot have judgment on the whole record, if, as all but one of the learned judges held, the seizure and sale be a

condition precedent. All are agreed, with the exception of another learned judge, who, agreeing that the seizure and sale form a condition precedent, yet holds that enough appears on the whole record to entitle the plaintiff to judgment. For this opinion there is, confessedly, no direct authority; but what the Court of Common Pleas said in *Goodburne v. Bowman* is relied on to show that, though it is admitted you cannot have recourse to one plea not expressly referred to, in considering the sufficiency or insufficiency of any other plea, yet that all the pleas may be taken into consideration in entering judgment on the whole record. But it does not appear to have been necessary to that case that this should be held; it was, therefore, extrajudicial in that case; and even if it had not been so, there is this difference between the two cases, that there the pleas were held bad out of which the immaterial issues arose, while here a good plea remains in bar of the action, after passing over the immaterial issue, or treating it as a nullity. The judgment of reversal, which may now be given, will, therefore, substantially agree with all the opinions but one of the learned judges, upon the assumption, in which all but another of the learned judges are agreed, that seizure and sale are a condition precedent.

The consequence will be, that the plaintiffs may begin again *de novo*; but if I am right in agreeing with those of the learned judges who hold want of notice to be immaterial, the most carefully conducted pleadings in another suit never can avail the plaintiffs, or entitle them ultimately to a judgment.

Of the questions to which I have directed the attention of your Lordships, it is to be observed, that, though the

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three first, those upon the merits of the defence, were decided in the Court of Common Pleas, those arising upon the pleadings do not appear to have been there made, and accordingly we have no judgment upon them except that in the Exchequer Chamber, where one only of the three learned judges who have not attended your Lordships has given any opinion on those points. Even of the questions upon the merits, the first appears to have been argued more fully than the other two; a great part of the judgment is upon the points which have never been made, or at least at all relied on here, and a very small portion of it relates to that which has been the subject of discussion before your Lordships.

Ld. Chancellor's
Speech.

LORD CHANCELLOR.—My Lords, notwithstanding the complexity of this case, and the difference of opinion amongst the judges upon some points, it does not appear to me that there is much difficulty in deciding upon the course this House ought to adopt, because there are points upon which there is a uniformity of opinion amongst the judges, in which it is, I think, impossible not to concur, as to such part of the case as must regulate that course, if your Lordships agree in opinion with the learned judges upon those points. That the condition of the bond was broken, there is, I conceive, no doubt; in this all the judges concur, and all but one concur in thinking that the appropriation of the property of the collector towards payment of the debt due from him was a condition precedent to calling upon the surety. Whether it was to exhaust the whole of his property, or such part only as came to the knowledge of the commissioners, was the subject of much difference of opinion amongst the judges; but, as the defendant

by his fifth plea set up the defence that the property of the collector, of which the commissioners had notice, had not been applied, and as the decision must turn upon the course adopted by the parties upon that plea, it does not appear to me to be very material to consider how far the defendant might have defended himself by pleading and proving that the collector had property unapplied, of which the commissioners had notice.

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According to the opinion of all the judges but one, the fifth plea, if established by a verdict, would have amounted to a good defence to the action. Objections were made to the manner in which the plaintiffs replication to this fifth plea was framed, but in substance the replication tendered an issue upon the defence set up in the plea, alleging that the collector had property of which the commissioners had notice. The defendant, however, instead of joining issue upon the point so raised by his rejoinder, departed from it altogether. The plaintiffs, instead of taking the proper course to correct this irregular pleading, took issue upon it, and the question is, what, under such circumstances, ought to be the fate of the action? The issue so raised, being, if to be considered as an issue at all, immaterial, cannot, though found for the defendant, be the ground of a judgment for him in the action, and the state of the pleading precludes the plaintiff having a judgment non obstante veredicto, for, so far from there being any admission upon the record of his title, there is the fifth plea, which, if true, would constitute a good defence to it. This unfortunate state of the pleadings could not have arisen without blunders on both sides. That there can be no replader in this House appears clear, from the opinion of all the judges, and the authorities to

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which they refer ; and as there can be neither judgment for the plaintiff nor for the defendant, the only course is to reverse, simpliciter, the judgment of the Court below.

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Speech.

LORD BROUGHAM.—The defendant cannot get his costs, though he succeeds ; but upon the whole, every thing connected with the rejoinder being considered, I cannot say that that, in my opinion, is to be regretted.

Judgment reversed.

[15th March 1838 and 28th July 1840.]

(On a Writ of Error from the Court of Exchequer Chamber
in Ireland.)

JOHN GALWEY, Plaintiff in Error.

GODFREY THOMAS BAKER, Defendant in Error.

Under a demise “reserving all wood and underwood, timber
“and timber-trees, standing, growing, or being on the
“demised premises, or at any time thereafter to stand
“or grow thereon, with full and free liberty of ingress
“and egress to take and carry away the same,”—Held,
that this clause secured to the owner of the inheritance
the benefit of such trees as were upon the premises at
the time of the demise, but did not transfer to him the
property in trees planted under the provisions of the
statutes in force in Ireland¹ respecting the planting of
trees, the property therein being vested in the lessee.

¹ By 5th and 6th Geo. 3. chap. 17. sect. 2. it is enacted, that if any tenant for life or lives by settlement, dower, courtesy, jointure, lease, or any office, civil, military, or ecclesiastical, impeachable of waste, or any tenant for years exceeding twelve years unexpired, shall plant sally, ozier, or willows, the sole property of such shall, during the continuance of the term, vest in the tenant, and he may cut and fell the same under the restrictions herein-after mentioned; and if such tenant shall plant any timber-trees of oak, ash, elm, fir, pine, walnut, chestnut, horse chestnut, quicken or wild ash, alder, poplar, or other timber-trees, such tenant, during the term, shall be entitled to a housebote, ploughbote, cartbote, and carbote of such trees by him planted, and at the expiration of the term, or where such trees shall have attained maturity, which shall first

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Statement.

JOHN and Edward Galwey, being seised in fee of lands at Lota, and the dwelling house thereon, by indentures of lease and release, dated the 28th and 29th days of October 1789, demised the same unto Sir Richard Kellett and his heirs for the term of three lives, with covenants for perpetual renewal.

The said indenture of release contained a clause in the words following; viz. "Saving and always reserving
" out of the said demise unto the said John Galwey and
" Edward Galwey, and to the person or persons who
" should from time to time be entitled to the reversion
" in said lands, all mines, minerals, and royalties hap-
" pening or being thereon, and also all wood and
" underwood, timber and timber trees, standing, grow-
" ing, or being thereon, or at any time thereafter to
" stand or grow thereon, with full and free liberty

happen, shall be entitled to the said trees, or the value of them, according to the directions herein-after mentioned; any covenant heretofore made, law, or usage to the contrary notwithstanding.

By 23d and 24th Geo. 3. chap. 39. sect. 6. it is enacted, that any tenant may sell his or her right, title, and property in said trees or coppices, or any part of the same, to any person under whom he or she may derive mediately or immediately, and that the person so purchasing shall have all the rights, titles, and properties and privileges therein which are or by this act shall be secured to the said tenant: provided always, that no sale or transfer of the same shall be deemed good in law, unless and until the same shall be done in writing, and signed by the said tenant, and an attested copy of said writing or instrument lodged with the clerk of the peace, in open court, at some quarter sessions of the peace for the county or county of a city, having been first proved to be a true copy by some credible witness, upon oath, before the justices at said sessions; and an attested copy of the copy of such writing or instrument, signed by the acting clerk of the peace, shall be deemed in all courts to be evidence of the due registry of such writing or instrument; and if the head or principal landlord shall so purchase the said trees or coppices from an under-tenant having a right to sell the same, then from and after the registry of the sale as aforesaid the said trees shall belong to said landlord, notwithstanding any intermediate term that may exist between the term of the said under-tenant and the estate of the said landlord.

“ of ingress and egress to take and carry away the
“ same.”

John and Edward Galwey having both died, the reversion in fee of the premises, subject to the demise for lives, became vested in the plaintiff, John Galwey.

The interest of Sir Richard Kellett in part of the demised premises subsequently became vested in William Massey Baker, who planted timber trees thereon, and duly registered the same pursuant to the provisions of the Irish statute of 23d and 24th Geo. 3. chap. 39, and shortly after died; whereupon Godfrey Thomas Baker, the defendant, became seised of part of the premises vested in William Massey Baker, deceased, and of all the estate and interest of Sir Richard Kellett therein.

The defendant Thomas Godfrey Baker having cut down and sold some of the timber trees planted and registered by William Massey Baker, the plaintiff John Galwey, in Hilary term 1835, brought an action of trover against the defendant, in the Court of King's Bench in Ireland, to recover the trees; and the defendant having pleaded the general issue, the action came on to be tried in March 1835, at the assizes for the county of the city of Cork, before Richard Wilson Greene, king's serjeant; when the several facts before mentioned having been proved, the jury, under the direction of the judge, found a verdict for the plaintiff. A bill of exceptions was tendered to the opinion of the judge by the defendant, and upon argument the Court of King's Bench gave judgment for the defendant. The plaintiff brought a writ of error to the Court of Exchequer Chamber in Ireland upon such judgment, but upon argument the judgment of the Court of King's Bench was affirmed.

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From the judgment of the Court of Exchequer Chamber this appeal is brought.

The Attorney General and Sir William Follett for the plaintiff in error.

Sir Frederick Pollock and Mr. Thesiger for the defendant in error.

Ld. Chancellor's
Speech.

LORD CHANCELLOR.—In this case many cases were referred to in the argument at the bar as to what would have been the effect of the terms of reservation in the lease if the timber acts had never been passed. In the view I take of this case it is not necessary to consider that point. These acts altered the common law as to the title of the lessor and lessee in timber planted by the lessee.

By the 5th and 6th of George the 3d, chap. 17. tenants for lives renewable for ever are made punishable for waste in timber trees and wood which they shall hereafter plant. By section 2. any tenant for life who shall plant timber trees shall, at the expiration of the term, or when such trees shall have attained maturity, be entitled to the trees.

By the 23d and 24th George the 3d, chap. 39. passed in 1783, any tenant for life who shall plant timber trees shall be entitled to cut, fell, and dispose of the same at any time during the term, provided the tenant causes such trees to be registered in the form prescribed. By the 6th section the act permits the tenant to sell his right, title, and property in such trees to the person under whom he holds, but no sale or mortgage of the same shall be deemed good in law unless and until the

same shall be done in writing and signed by the tenant, and a copy registered with the registry of the trees; and if the head landlord shall so purchase such trees from the tenant, then from and after the registry of the sale the trees shall belong to the said landlord, notwithstanding any intermediate term. By the 16th section it is provided, that nothing therein shall be construed to extend or to relate to any trees planted or to be planted in pursuance of any covenant contained in any lease, nor to invalidate any such covenant.

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Such being the state of the law, the lease in question was granted, in 1789, for three lives, with a covenant for perpetual renewal, with this clause: "saving and always" "reserving out of the said demise, unto the lessor and" "the owner for the time being of the reversion, all" "mines, minerals, and royalties happening or being" "thereon, and also all wood and underwood, timber" "and timber trees standing, growing, or being thereon," "or at any time thereafter to stand or grow thereon," "with full and free liberty of ingress and egress to" "take and carry away the same."

It was argued, that, under these statutes, any contract between the lessor and lessee by which the lessee's title to the trees he might afterwards plant should become the property of the landlord would be illegal, as contrary to the policy of the statutes, and therefore void. It is, I think, unnecessary to express any opinion upon this point, but it may be observed that the 6th section of the 23d and 24th of George the 3d carefully guards the tenant in any sale of the trees planted by him to his landlord, and that the 16th section guards against the act operating in cases of trees planted in pursuance of any covenant. Any construction, therefore, which may

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have the effect of depriving the tenant, and through him the public, of the benefit of the act, would be contrary to the intention and policy of the acts, and ought not to be adopted, without necessity. These two sections, and, indeed, all the provisions of the act, establish this, that trees planted by the tenant under the provisions of the act are the absolute property of the lessee. In this case the trees in question were planted by the lessee, and duly registered in pursuance of the direction of the act, and were cut by the defendant, who holds his interest in the lease. These trees, therefore, are the property of the defendant (the lessee) under the provisions of the act, and the lessor never had any estate or interest in them; unless he can maintain his claim under the clause in the lease, and to do so he must show that the clause is effectual to give to him (the lessor) a title to property which was not and never would, by operation of law, be his. It must, therefore, amount to a transfer to him of property which the tenant might hereafter create and become entitled to; and in considering the terms of the clause, it may be inferred that there must have been some timber trees upon the estate, and that trees, not then existing as such, might grow up on the property, other than such as might be planted by the lessee; all which, as part of the inheritance, would belong to the lessor, subject to the tenant's right to the use and enjoyment of them, and which, without the consent of the lessee, or some express provision for that purpose, the lessor could not cut, or enter upon the estate for the purpose of taking away.

It may also be assumed, that the terms used ought not to be construed so as to transfer the property of the lessee to the lessor, if any reasonable construction can

be given to the terms, with reference to any other subject matter upon which they can operate. The clause is a reservation out of the demise,—not a reservation of some new right or interest, but an exception from the demise, and the matters so reserved or excepted are mines, minerals, royalties, woods, and trees then growing thereon; all, therefore, at the time part of the lessee's property. The object of the clause so far was to except out of the demise, and reserve to the lessor, certain parts of the property of the lessee, and to do so effectually it was necessary also to except trees which might thereafter grow upon the estate, under circumstances which would give him the property in them. To effect this the words “or at any time thereafter to stand “or grow thereon” were necessary. Being necessary for that purpose, which is the general purpose of the rest of the clause, are they to be construed to have the effect, not of excepting or reserving to the lessor that to which he would otherwise have a qualified title, but of assigning and transferring to him that which would be the property of the lessee?

It is also to be observed, that the right is reserved to the lessor of entering upon the land demised, and to take and carry away such trees. If, therefore, the parties intended that this clause should apply to trees to be planted by the tenant under the provisions of the statute, it would have the effect of depriving the tenant of the benefit intended to be secured to him by the statutes, without providing any transfer to the lessor; for it could not have been supposed that the lessee would plant, if the lessor were to be at liberty to enter upon the land demised and cut and carry away the trees so planted; and as the act 5th & 6th George the 3d

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recites, it is equal to inheritance, whether tenants do not plant, or have a property in what they plant.

It appears to me, therefore, that the true construction of this clause is, that it was intended to exclude the tenant's right and interest in such trees as formed part of the inheritance, and thereby to secure to the owner of the inheritance the full benefit of such trees, and not to transfer to him the property in trees which, being planted under the provisions of the statutes, formed no part of the inheritance which belonged to the lessee. I make no observation upon the point raised at the bar as to the regularity of the proceedings in Ireland, the parties having agreed to waive that question, and to ask the judgment of this House upon the merits. It appears to me, therefore, that the judgment must be given for the defendant in error, and with costs.

Ld. Brougham's
Speech.

LORD BROUGHAM.—I certainly agree with my noble and learned friend in the observations he has addressed to your Lordships in this case. It does not appear to me to be necessary to determine either of the two questions which have been made in this case; first, whether or not after-planted trees can be made the subject of reservation in a demise, this really seems no question at all; secondly, whether or not, the sixteenth section of the 23d and 24th George the 3d having specially excepted from the operation of the act trees planted in pursuance of covenants in a lease, and having also declared these covenants themselves to be valid, notwithstanding the provisions of the act, all clauses expressly reserving the after-planted timber to the reversioner are insufficient for that purpose, as being rendered void by the act? These questions can only

arise upon the supposition that the clause in question does contain such a reservation of after-planted trees. The provisions of the act to encourage the planting of timber by tenants, and the sixteenth section of the latter act, show that the reservation must be plain and distinct.

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Admitting for the present that after-planted trees may well be reserved, or rather admitting that parties may contract so as to give the reversioner the property in trees planted by the tenant, even in cases where, as here, the lease has a clause of perpetual renewal, still both the policy of the statutes and the relation between the parties in respect of the property show that they must have used clear and unequivocal words to express their intention; and that where these words are easily capable of another sense—a sense consistent with the statutory provisions, and consistent with the probability of the case as arising out of their several interests and the property demised, we should, as the Court below appears to have done, prefer reading the covenant in that sense.

The words on which the plaintiff in error relies are these, “at any time thereafter to stand or grow thereon,” that is, on the premises demised. The question is, whether or not these words must needs mean trees after planted. But, plainly, they do not necessarily extend to such trees, for they may only be intended to reserve trees afterwards growing upon stools of trees already planted, nor is it at all probable that parties would bind themselves in the way supposed by the plaintiff’s construction. Why should a person stipulate for property in trees which the stipulation renders it in the highest degree unlikely should ever come in esse, by

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making it in the highest degree unlikely that the other party should ever plant them? And, taking the words of the demise no more strongly against the lessor than the lessee, why should a person bind himself not to plant for profit, or, which comes to the same thing, only to plant for the profit of another?

The clause reserving liberty of ingress and egress to take and carry away the same, plainly proves nothing; for, first, this may apply to the mines and minerals which are reserved, and, next, it was necessary, on account of the timber growing at the time of the demise. As, therefore, I can see nothing in the clause which makes the construction put upon it by the plaintiff unavoidable, but, on the contrary, incline to think the opposite construction the more reasonable, I can have no doubt that the covenant is insufficient to take the case out of the statutory provisions, and, therefore, that the judgment of the Court below ought to be affirmed.

Judgment of the Court of Exchequer Chamber in Ireland, affirming a judgment in the Court of King's Bench in Ireland for the defendant in error, affirmed, with costs.

[*4th and 6th August 1840.*]

(From the Court of Chancery, Ireland.)

PETER DIGGES LA TOUCHE, Appellant.

The Right Honourable GEORGE CHARLES
Earl of LUCAN, Respondent.

Sir Neal O'Donell being tenant for life of a freehold estate, and of an estate renewable for lives, subject to a head rent (which was in arrear), and having filed a bill to prevent the execution of a judgment in ejectment, brought by the head landlord, for nonpayment of rent, by deeds of 9th and 10th October 1798 conveys his life estate therein to a trustee, upon trust to raise 10,000*l.* by mortgage, for payment of the arrears of rent and other incumbrances, and out of the rents, after payment of other charges, to make provision for himself and the other members of his family. On the 9th March in the same year Lord Lucan transfers certain stock to the credit of the suit, for the purpose of redeeming the estate from the arrears of rent. In the month of June 1826 the trustee under the trust deed, knowing of the advance made by Lord Lucan, writes a letter to Lord Lucan's solicitor, (antedated in February,) stating, that if any party would advance money for the arrears of rent and costs, he would consider such advance as raised by him under the power contained in the trust deeds, and would exercise the power in the best manner he could for securing the advance.

During the pendency of negotiations between the trustee and Lord Lucan, for mortgaging the estate for securing the advance under the power contained in the trust deeds, Sir Neal O'Donnell dies. Held, that a bill filed by Lord Lucan against the trustee for carrying into execution the trusts of the deeds, and for charging the estates, under the provisions of the deeds, with the payment of his advances, could not be sustained, inasmuch as Lord Lucan, not being a party to the deeds, could not enforce their execution. Held, likewise, that the letter could not make Lord Lucan a cestuique trust under the deeds, as it purported only to give him a mortgage of the estates for the life of the tenant for life, whose death prevented the mortgage being effected.

Décreé below reversed.

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SIR Neal O'Donell, under deeds of the 9th and 10th October 1798, was tenant for life of a certain estate, known by the name of the Newport estate, in the county of Mayo, for a term of three lives renewable for ever, at the yearly rent of 980*l*., and of certain freehold estates situate in the counties of Mayo and Galway, called the Cong and Newport estates.

In Easter term 1825 the head rent being very much in arrear, and the Marquis of Sligo being then entitled to the rent and reversion of the Newport estate, he brought an ejectment for nonpayment of the rent, and judgment was, with the consent of Sir Neal O'Donell, entered up in the ejectment suit.

On the 10th day of November in the same year Sir Neal O'Donell exhibited his bill of complaint in the Court of Chancery of Ireland against the Marquis of Sligo and others, praying that he might be at liberty to redeem the premises upon payment of the rent then due to Lord Sligo.

Sir Neal O'Donell being indebted to Lord Sligo in the arrear of rent, and also to several other persons in large sums of money for interest then due on the incumbrances created by the deed of the 10th of October 1798, and being largely indebted on his own account, in the month of October 1825 gave his solicitor, William Furlong, instructions to prepare a deed, vesting his life interest in the estates in trust for the purpose of raising a sum of money sufficient to discharge the arrear of rent and the other demands to which he was liable, and also to charge the estates with certain annuities for the necessary maintenance and support of himself and family.

In the month of December 1825, or in the beginning of January 1826, while the trust deed was being prepared, several overtures were made to Sir Neal O'Donell on the part of the respondent, then Lord Bingham, who had declared himself a candidate for the representation in parliament of the county of Mayo, at the election which was then about to take place, for his support and influence. At that time Lord Bingham had proposed, on the part of his father, to advance money for the payment of the arrears of rent, and it was proposed by the solicitor of Lord Lucan that Lord Bingham should be appointed joint trustee with the appellant in the trust deed, but in consequence of the opinion of counsel that Lord Bingham should not be a trustee, it was settled that the appellant should be appointed sole trustee under the trust deed; and, accordingly, by indentures of lease and release, dated the 12th and 13th of February 1826, the release being made between the said Sir Neale O'Donell, of the one part, and appellant, of the other part, Sir Neal O'Donell conveyed the Newport estate, then held under

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the Marquis of Sligo subject to the rent of 980*l.*, and the Cong and Newport estates, to the appellant, his heirs and assigns, for the life of Sir Neal O'Donell, upon trust, after payment of the expenses incurred in the performance of the trusts, to raise 10,000*l.* by mortgage of the estates, in order to pay what was due for the arrears of rent, and to pay other incumbrances therein mentioned; and upon trust, out of the rents and profits of the estates, after paying the interest of certain incumbrances, to make some annual payments to Sir Neal O'Donell and the other members of his family.

Prior to the execution of the trust deed, Sir Neal O'Donell furnished Lord Bingham's solicitor with a copy of the draft of the trust deed.

In the latter end of the month of February or beginning of March 1826, Sir Neal O'Donell was offered the loan of 6,000*l.* by a Mr. Malachy Ryan, for the purpose of discharging the arrear of rent due to Lord Sligo; but his offer was declined by Sir Neal O'Donell, on an assurance, on the part of Lord Bingham, that he would procure the necessary funds for the payment of the arrear of rent.

On the 9th of March 1826, pursuant to an order for that purpose made in the redemption suit, a sum of 4,002*l.* 1*s.* 3*d.* old government 3½ per cent. stock, being the property of Richard Earl of Lucan, the father of respondent, was transferred to the credit of the cause for the redemption of Sir Neal O'Donell's interest in the Newport estate.

On the 13th June 1826, (shortly previous to the election of Mayo, which took place in that month,) the following letter was signed by the appellant, and sent to the solicitor of Lord Lucan:—

" Dear Sir,

23d February 1826.

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" Sir Neal O'Donell has now executed the deed
" vesting all his life estate in me, in trust to raise
" money, in the first place, to pay the rent and costs of
" the ejectment pending, and, next, to pay the interest
" of the incumbrances. If you will prevail on any client
" of yours to advance three or four thousand pounds in
" time to pay the rent and costs, or even on account of
" it, I will consider such advance as raised by me under
" the power given me, and will, whenever you please,
" exercise that power, by securing such advance in the
" best manner I am empowered by the deed ; it being
" distinctly understood that in doing so I am not to
" be in any way personally answerable for either the
" principal or interest, further than as trustee for the
" due application of the rents pursuant to the trust
" deed.

" I am, dear sir,

" yours, very truly,

" PETER DIGGES LA TOUCHE."

" To Richard Livesay, esq.

" Mountjoy Square."

This letter had been prepared and drawn out by Sir Neal O'Donell's and Lord Lucan's solicitors, and had been agreed between them should be antedated.

In the interval which elapsed between the 13th June 1826 and the 1st March 1827, when Sir Neal O'Donell died, several negotiations were carried on between William Furlong, the appellant's solicitor, and Richard Livesay, the solicitor of Lord Lucan, for the purpose of devising some mode of giving Lord Lucan the benefit of the trusts of the deed of the 13th of February 1826, for securing the advances he had made for the payment

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of the arrears of rent. On such occasion William Furlong explained the nature of the deed, and particularly with reference to the provision thereby made for Sir Neal O'Donell and his family, whereupon Richard Livesay, and respondent, who was present, declared, on the part of Lord Lucan, that they had no idea of interfering with that provision ; but that they conceived the income of the estates would, after payment of the interest of prior incumbrances, and the several annuities to Sir Neal O'Donell and his family, be sufficient to allow of instalments of 1,000*l.* per annum to be applied in liquidation of the advance made by Lord Lucan ; but William Furlong objected to so large an instalment, and it was agreed that said Richard Livesay should get such deed prepared as he conceived the persons entitled to ; and, accordingly, in July or August 1826, a draft deed of mortgage of the trust estates for the life of Sir Neal O'Donell was furnished by Richard Livesay to William Furlong, which purported to grant the lands in mortgage to Richard Earl of Lucan for the life of Sir Neal O'Donell, and to declare that appellant should, on or before a certain day to be therein named, cause to be effected a policy of insurance on the life of Sir Neal O'Donell in the amount of said loan, and assign the same to Richard Earl of Lucan, the premium on said insurance to be paid by appellant ; and further, that appellant should pay to Lord Lucan the said loan by half-yearly instalments, the first instalment to be paid on the first of November following. The draft deed was afterwards returned by William Furlong to Richard Livesay, and, in consequence of objections made by William Furlong, no deed was executed pursuant to the draft.

In the month of January 1827 a further draft of mortgage was furnished by Livesay to William Furlong, and discussions took place relating to this draft till the time of Sir Neal O'Donell's death. In consequence of his death, and the disagreement of the parties as to the form of the deed, no mortgage deed was ever executed. During the progress of the negotiations, the persons acting on behalf of Lord Lucan were fully aware of the manner in which appellant applied the rents of the trust estates, and no demand was at any time made on the part of Lord Lucan, that appellant should apply any part of the rents in payment of the principal or interest of the said advance.

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Several attempts were made to effect an insurance on the life of Sir Neal O'Donell, but without effect, in consequence of his advanced age and state of health.

On the 21st of March 1827 Richard Lord Lucan, since deceased, filed his bill in the Court of Chancery of Ireland against the appellant and other persons interested in the estates, and thereby stated the proceedings by ejectment taken by Lord Sligo for the recovery of the rent due out of the Newport estate, and the proceedings in the Court of Chancery on the part of Sir Neal O'Donell to redeem said estate; and that negotiations were set on foot between Sir Neal O'Donell and appellant, and their agents, to induce Lord Lucan to advance a sum of money for the redemption of the lands under ejectment; and for that purpose it was proposed that the life estate of Sir Neal O'Donell in all his estates, including the estate under ejectment, should be vested in respondent as sole trustee, or jointly with appellant, for the purpose of securing such advance: that appellant objected to respondent being a party to

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the deed, and prevailed on Sir Neal O'Donell to execute a deed to appellant as sole trustee, not only for the purpose of securing said advances, but for other purposes in no wise connected therewith, and that accordingly the deed of the 13th of February 1826 was executed by and between Sir Neal O'Donell and appellant. The bill further stated the letter of the 23d of February 1826 from the appellant to the agent and solicitor of Lord Lucan. The bill further alleged, that plaintiff being informed by his agent and solicitor, that any sum to be advanced by him on the faith of the letter would be the first charge on the life estates of Sir Neal O'Donell under the trust deed, and would be paid in preference and priority to any other charges created by said deed, plaintiff, on the faith of said letter, and of the representations so made by appellant as to the security of such advance, and for the purpose of redeeming said estates from eviction, on the 13th of March 1826 caused a sum of 4,002*l.* 1*s.* 3*d.* government three and a half per cent. stock, belonging to plaintiff, to be transferred to the credit of the redemption suit in the name of Sir Neal O'Donell, and that by reason of such transfer said estates were saved from eviction. The bill further alleged, that at the time said transfer was made, and for a long time subsequent thereto, neither plaintiff nor any person on his behalf had seen the deed of trust or any copy thereof, or was acquainted with the provisions thereof, save from the representations so made by appellant, by his said letter of the 23d February 1826, and other the representations of the appellant to the like effect, and of the persons acting for the appellant; and it having been represented to plaintiff's solicitor by the appellant and his solicitor, that the time

for the redemption of said lands was too short to enable him to prepare any formal deed or instrument to be executed by appellant to secure the repayment of said advance before same should be actually made, and appellant having engaged to execute all necessary instruments, plaintiff remained perfectly satisfied. The bill further alleged, that after the stock was transferred, the solicitor of plaintiff applied to appellant for a copy of the trust deed, which after some delay was furnished; whereupon negotiations were set on foot to prepare a deed or instrument to give plaintiff the first charge on the rents and profits of the trust estates; and that plaintiff, in compliance with the request of appellant, and as a personal accommodation to him, was willing to forego his strict rights under said deed of trust and said letter, and to give time for the payment of said money; but after sundry drafts of deeds had been prepared, and many fruitless attempts to procure the appellant to execute a deed, appellant refused to execute any deed whatever. The bill further alleged, that the appellant had received a large sum of money, as well for arrears as for the accruing rents of the estates, which ought to have been applied in discharge of the advance made by plaintiff, in priority to all other demands, but which had not been so applied.

And the bill prayed that the trusts of said indenture of the 13th of February 1826 might be decreed to be carried into execution, and that an account might be taken of the sums received, or which, without wilful default, might have been received by the appellant, of the rents, issues, and profits of said trust estates since the execution of the said deed of trust of the 13th day of February 1826, and how the same had been applied

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and disposed of; and that an account might be taken of the sum advanced by said Richard Earl of Lucan for the redemption of the said lands under ejectment; and that the same, together with legal interest thereon from the time when the same was so advanced, might be decreed to be well charged on the said trust estates so conveyed to the appellant for the life of Sir Neal O'Donell the younger, in priority to all other charges created by the said trust deed, save the costs and expenses incident to the preparation of the said deed, and the execution of the trusts thereof; and that an account might also be taken of the sums due and owing to all other persons interested under the trusts of said deed; and that Richard Earl of Lucan and such other persons might be paid the amount of their respective demands, according to the order of priority provided by the said deed.

The appellant, by his answer, denied that he was privy to any negotiations for the purpose of inducing the late Lord Lucan to advance said redemption money, and that he was utterly ignorant of any dealings and transactions between plaintiff and Sir Neal O'Donell, and those acting for them respectively, nor was he apprized of any negotiations or propositions for the loan of said money by the plaintiff until after the transfer of said stock had been made; and said that neither the appellant nor, as he believed, any person on his behalf, ever entered into a contract with the plaintiff, or any person on his behalf, for the loan of the money, or for the transfer of the stock; nor was said stock transferred to the credit of the redemption suit with the knowledge or concurrence of the appellant, nor was there any previous communication or treaty with the appellant on

the subject; and the appellant further stated, that he never heard and was not aware that the stock so transferred belonged to Richard Earl of Lucan, or to respondent, until long after the transfer had been effected. The appellant further stated, that the election for the county of Mayo took place in the month of June 1826; and that the appellant was informed, and believed, that Richard Livesay, the father and partner of Edward Livesay, a short time previous to said election informed appellant's solicitor that the stock which had been transferred was the property of the plaintiff, and that it was apprehended an attempt would be made at the approaching election to charge the respondent with bribery; and that Richard Livesay proposed to the appellant's solicitor that some letter should be written by the appellant to Richard Livesay, acknowledging that the advance of said stock was made to appellant, as a trustee, to protect the trust property from eviction for nonpayment of rent; and the appellant admitted he signed the letter bearing date the 29d day of February 1826, and that said letter was handed to him by Richard Livesay on the 13th of June 1826, and that the appellant, being at the time occupied with other business, subscribed his name thereto, and handed it back to Richard Livesay; and that the appellant did not at the time take notice, nor was he aware, nor did Livesay intimate to him, that said letter was antedated; and appellant stated expressly in his answer, that had he been aware of such fact he would not have signed said letter without correcting the date; and appellant stated that the advance was not and could not in any manner have been influenced by the letter, inasmuch as the letter was not written or agreed to be written until the 13th day of June 1826,

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long after the advance had been made. The appellant admitted that negotiations were carried on after the transfer of said stock between plaintiff's and appellant's respective solicitors, for the purpose of arranging the form of a deed, but denied it was for the purpose of giving to the plaintiff the first charge on the rents of the trust estates, but for the purpose of securing the repayment of said advance in such manner as should be reasonable with regard to the execution of the trust reposed in him; and the appellant denied that he ever refused to execute a deed to secure the repayment of the advance, provided it was consistent with the trusts of the deed of the 13th of February 1826.

On the 26th May 1836 the cause, being at issue, came on to be heard before the Lord Chancellor of Ireland, when it was decreed that the trusts of the said indenture of the 13th day of February 1826 should be carried into execution; and the plaintiff was thereby decreed entitled to the benefit of said trust deed; and it was referred to the master to take an account of rents and arrears of rent received, or which, without wilful default, might have been received by appellant from the trust estates since the execution of the deed of 13th day of February 1826, and how the same had been applied and disposed of. And it was referred to the master to take an account of the sum advanced by the plaintiff for the redemption of the said lands so under ejectment; and it was thereby decreed that the same, together with legal interest thereon from the time when the same was so advanced, was well charged on the said trust estates so conveyed to appellant, for the life of the said Sir Neal O'Donell the younger, in priority to all other charges created by the said trust deed, save the costs

and expences incident to the preparation of the said deed, and the execution of the trusts thereof. And it was further ordered, that said master should take an account of the sums, if any, due and owing to all other persons interested under the trusts of the said deed. And it was further ordered, that all creditors claiming under the said trust deed of 13th February 1826 should be at liberty to come before the said master to prove their respective demands.

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On the 16th day of November 1838 the master made his report, pursuant to the decree; and under several decrees dated the 26th May 1836, 15th February 1839, and ultimately by a decree of 10th June 1839, it was declared that the appellant was chargeable with the sum of 5,276*l.* 8*s.* 6*d.*, trust funds which had been misapplied by him, and also with the sum of 6,589*l.* 16*s.* 1*d.*, arrears of the rent of the trust estates which might have been received by him but for his wilful default, making together the sum of 6,866*l.* 4*s.* 7*d.*; and it was thereby ordered that the appellant should pay within twelve months unto plaintiff, Richard Earl of Lucan, the sum of 6,204*l.* 8*s.* 7*d.*, (being the sum advanced by him for the redemption of the lands under ejectment, together with interest for the same,) and should pay interest on the principal sum until paid.

From the decrees of the 26th of May 1836, and 15th of February 1839, and the 10th of June 1839, this appeal is brought.

Mr. Pemberton and Mr. Jacob for the Appellant.—
The deed of trust mentions all the charges upon the estates; no express sum is mentioned in respect of the

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Appellant's
Argument.

chief rent, as the sum due was not ascertained. The transfer made by Lord Lucan was not made upon a contract with the trustee; the letter was sent subsequent to the advance of the money; no mortgage was ever agreed upon or executed. The terms of the bill go very far to dispose of this case; it states that the trust deed was prepared and executed without the knowledge of the plaintiff; he was not, therefore, a party to the deed, and there was no contract made with him. In this country the bill would have been met by a demurrer. Lord Lucan advanced the money to obtain Sir Neal O'Donell's interest at the approaching election for the county of Mayo. The Lord Chancellor decided this case upon the ground that Lord Lucan was the salvager of the estate; how does Lord Lucan become a cestui-que trust under the deed? How is he entitled to call for the execution of the trust? He says, I have a right to stand in the place of Lord Sligo. But Lord Sligo could not call for an execution of the trust; there is no contract between the trustee and Lord Sligo. It is admitted that the money was to be raised by mortgage under the power; could he, by these means, have been a cestuique trust under the deed? *Palk v. Clinton*¹ decides that he could not. Lord Lucan cannot say that he was in a better situation than if he had got the mortgage deed. The bill is founded upon a false fact; the money was advanced long before the letter was written, and upon an assurance that he should have Sir Neal O'Donell's support at the election. He never demanded the rents, and the rents are applied in payment of prior charges. The cases of *Worrall v. Harford*² and

¹ 12 Vesey, 48.

² 8 Vesey, 4.

Garrod v. Lord Lauderdale¹ seem to have been forgotten.

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Respondent's
Argument.

Mr. K. Bruce and Mr. Jas. Russell for the Respondent.
—It is not put in issue that Lord Lucan had no right to proceed under the trust deed. If it had been put in issue, Lord Lucan might have stated facts which would have enabled him to take advantage of that deed. All persons treated this deed as one which might include Lord Lucan's demand, and it is clear that it was intended to be paid under the trusts of the deed. If this case came within the principle of *Walwyn v. Coutts*², the deed would be revocable. The money applied by Lord Lucan was the means of saving the estate. We are creditors, not volunteers.

Mr. Pemberton in reply.—Has any principle been stated upon which this decree can be sustained? Lord Lucan is not a party to the deed. A volunteer would stand in a better situation than a creditor, though there is a trust deed for the benefit of creditors. The advances could not be made upon the security of the deed, for he says he did not know of it. Supposing he could have claimed under the deed, how could he have insisted upon it, in the manner in which it has been decreed?

Appellant's
Argument.

6th August 1840.

LORD CHANCELLOR.—This case of *La Touche v. Earl of Lucan* is an appeal against an order of the Court of Chancery in Ireland, by which a decree was made against the appellant in these terms:—"It is ordered

Ld. Chancellor's
Speech.

¹ 2 Russ. and Mylne, 451.

² 3 Simons, 14.

LA TOUCHE “ and decreed, that the trusts of the said indenture of
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 EARL “ the 13th of February 1826 shall be carried into exe-
 OF LUCAN. “ cution,” and the plaintiff is justly decreed entitled to
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Ld. Chancellor's it was referred to the master “ to take an account of
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 “ the sums received, or which, without wilful default,
 “ might have been received, by the appellant out of the
 “ rents, issues, and profits of the said trust estates since
 “ the execution of the said deed of trust of the 13th of
 “ February 1826, and how the same have been applied
 “ and disposed of; and also to take an account of the
 “ arrears of rent due out of the said trust premises at
 “ the time of the execution of the said trust deed, and
 “ what part thereof has been received by the appellant,
 “ or, but for his neglect and default, might have been
 “ received, out of the said arrears since the execution of
 “ the said trust deed, and how the same have been
 “ applied and disposed of; and it was referred to the
 “ master to take an account of the sum advanced by
 “ the plaintiff for the redemption of the said lands so
 “ under ejectment; and it was thereby decreed, that
 “ the same, together with legal interest thereon from
 “ the time when the same was so advanced, was well
 “ charged on the said trust estates so conveyed to the
 “ appellant for the life of the said Sir Neal O'Donell
 “ the younger, in priority to all other charges created
 “ by the said trust deed, save the cost and expenses
 “ incident to the preparation of the said deed and the
 “ execution of the trusts thereof.”

The question in this case arose under a trust deed, by which the tenant for life of certain estates, partly leasehold and partly freehold, conveyed what interest he had in those trust estates to certain trustees on certain trusts.

It appears, that as to the leaseholds Lord Sligo, who was the owner of the fee, and entitled therefore to the head rent, the head rent being in arrear, had proceeded by ejectment to recover the lands liable to this rent; that under the provisions of the act on that subject in Ireland a certain time was allowed to the tenant to pay the arrear of that rent, in order to save the estate from being forfeited to the head landlord; that being pressed, not only by this demand of the head landlord, but being subject to a variety of other deeds, the tenant for life executed a trust deed, by which he conveyed the property to trustees, with a declaration of trust, by which he was to apply the rents in a certain way prescribed, with a power of raising 10,000*l.* by mortgage of the estate, in order to pay what was due of the rent, and to pay the other charges set out in the schedule of the deed. Amongst others there was a provision by which the trustees were authorized to make certain payments to the tenant for life, and the members of his family.

It appears, (though the history of that is not very accurately ascertained by the evidence,) that a sum of money was paid into court in order to meet this demand of Lord Sligo; that appears, no doubt, to have been the money of Lord Lucan, and there is some evidence of some previous communication as to that money being paid into court. The bill, however, alleges that it was paid into court under these circumstances:—"That the principal object which Sir Neal O'Donell had in view in executing the said deed of trust having been to raise, by means thereof, a sum of money sufficient to secure the said estates from eviction, and La Touche having succeeded in procuring himself to be made sole trustee thereunder, he, La Touche, wrote a

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“ letter to the plaintiff’s law agent and solicitor in this
“ cause, bearing date the 23d day of February 1826,
“ thereby stating that Sir Neal O’Donell the younger
“ had executed a deed vesting all his life interest
“ in him the said La Touche, meaning thereby the
“ said recited indenture, in trust.” It then says that
the said letter was “duly subscribed with the proper
“ name and handwriting of the said La Touche; that
“ having been informed by the plaintiff’s agent and
“ solicitor of the contents of the said letter, and being
“ assured by him that any sum to be advanced by the
“ plaintiff, in pursuance of the said letter, would be the
“ first charge upon the life estate of the said Sir Neal
“ O’Donell the younger under the trust deed, and
“ would be paid to the plaintiff in preference and
“ priority to any of the charges created by the said
“ deed as therein contained, and having been willing
“ and desirous to serve Sir Neal O’Donell the younger
“ by advancing a sufficient sum of money to prevent
“ the eviction of his estates, the plaintiff accordingly
“ authorized such advance to be made, and that a sum
“ of money which the plaintiff then had vested in old
“ government 3½ per cent. stock should be applied to
“ that purpose.”

The allegation, therefore, is, that upon the faith and credit of that letter the advance was made. The advance, I think, was made in March, the letter certainly bears date in February; but it is beyond all question established by the case of both parties that the letter was actually received in the month of June following. Those, therefore, who gave instructions for the filing of this bill have, in that respect, put a case upon record which they must have been aware could not be sup-

ported by the facts when they came to be proved by evidence.

There is some evidence, as I have said, of some negotiation or promise held out as to the mode in which this money was to be secured, but Lord Lucan was no party to the trust deed. Lord Sligo was no party to the trust deed. The deed was a deed executed by the owner of the property, for the purpose of disposing of this property in the way which was considered most beneficial to him, to relieve the estate from the pressing demand for the head rent, and the other incumbrances which affected it, reserving to himself certain provisions out of the estate. Now, the bill, stating the trust deed, and stating this letter, prays that the trusts of the deed may be carried into effect,—“that the trusts of the “said indenture may be carried into execution, and an “account be taken of the sums received, or which, “without wilful default, might have been received;” precisely, in fact, in the terms of the decree which was afterwards pronounced.

Two questions, therefore, arise upon these pleadings: first, whether there was any right on the part of the plaintiff to call for an execution of the trusts of that deed independently of the letter; and secondly, whether that letter gave him any title to the decree which has been pronounced? Now, it does not seem, so far as I can ascertain, that there was brought very distinctly, if at all, before the consideration of the Lord Chancellor for Ireland, (for I see no reference to it in his Lordship’s judgment,) that train of decisions which has now established the law of this country beyond all question; namely, that where a party creates a trust for the purpose of paying his debts, the creditors do not thereby

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become cestuique trusts, nor become invested with any power of calling upon the Court to execute those trusts. That doctrine, laid down by Lord Brougham in the case of *Garrod v. Lord Lauderdale*, in which he reviewed all the authorities, appears to have been acted upon ever since, and has been considered as established by *Wallwyn v. Coutts*; not that it was new law, but that case brought it directly into operation, and it is now an established principle of the court of equity.

Then, how does this case differ from those cases? A party having merely a demand of the owner of the estate cannot be considered, upon the authority of those decisions, as having any right to call for the assistance of a court of equity to enforce the execution of trusts voluntarily created for payment of the owner's debts; neither did the plaintiff in this case gain any such right by paying the money which was applied to the discharge of Lord Sligo's demand for rent as head landlord. In the first place Lord Sligo had no equitable right; he had the legal right which the law gives him of recovering by ejectment; but Lord Sligo had no more right to come in as a creditor, and ask for the execution of that trust deed, than any other creditor; he was, as between himself and the author of that deed, only a creditor, independently of any other right which his station as landlord gave him against the estate. But, even if Lord Sligo had had those rights, the present Lord Lucan does not connect himself with Lord Sligo. There is no assignment of the interest of Lord Sligo, and if, for the accommodation of the tenant for life of the estate, who was pressed by the ejectment at the suit of Lord Sligo, Lord Lucan advanced the money by which the claim of Lord Sligo was satisfied, that would not have given him

any claim, even if Lord Sligo had any; but Lord Sligo not having any, it is not very material to consider that question. Then, how does this letter give him any title? The history of the letter is, that it was written in the month of June, after the money was paid into court, which was paid in in the month of March; and it was a promise or undertaking by the trustee that he would give the best security he could under that trust deed. That cannot make him a cestuique trust under the trust deed. If the letter gave him any title at all, it would be to have that carried into effect which that letter undertook; that is, to give him the best security he could under the trust. Now, if we look to that trust deed, we shall find that the only security it could give him would be the raising 10,000*l.* by the mortgage of the estate, and it appears that negotiations went on for that purpose. It was never the intention of the parties, as manifested by the evidence, to deprive the family of the benefit of those payments which they were in the habit of receiving. On the contrary, those intentions were expressly disclaimed, and what the parties intended is manifested by the drafts that were prepared for the purpose of carrying the contract into effect. They, in fact, contracted for the only security they could contract for, namely, such security as the trustee could give them by virtue of the trust which was charged upon the estate.

The negotiations went on, and objections were made to the several deeds that were proposed for that purpose, till an event happened which prevented the possibility of that which was intended, namely, the death of the tenant for life out of whose estate the charge was to be paid. The result, therefore, is neither more

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nor less than this: the negotiation by the parties having control over an uncertain fund, depending on the life of another, for creating a charge upon that property, was extended until the period when the dropping of the life prevented its being carried into effect. But to carry a contract for that purpose into effect was not either the object of the suit or the purport of the decree. If that had been the right claimed, it is not necessary to consider what might have been the result of such a suit. The Court has granted relief upon the supposition that the effect of the letter was to make the plaintiff a cestui-que trust, not for the purpose of doing that which was contracted, namely, obtaining the benefit of that charge, but a cestuique trust from the commencement, so as to call upon the trustee for the repayment, not only of those sums of money which he had paid before the right accrued, but those which he had paid with the knowledge of all the parties, including the party who now makes the payments a ground of complaint.

I presume this decree was pronounced, owing to the authorities in this country not having been called to the attention of the Court of Chancery in Ireland. When we see what the decree is, and refer to the authorities to which I have before adverted, it is, in my opinion, clearly not consistent with those authorities, and consequently it cannot stand. It is unnecessary to consider the subsequent part of the case, which would be only material in the event of this House being of a different opinion upon that point. The result appears to be, that the decree, as made, is inconsistent with the principles established by the decisions to which I have referred.

Mr. KNIGHT BRUCE.—Will your Lordships permit me to call your attention to the costs subsequently to the decree? Your Lordships are aware that the parties proceeded in the office under the decree, without appealing. I suppose your Lordships do not mean to include any costs after the first hearing.

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LORD CHANCELLOR.—No, I think not. The decree to be dismissed with costs, up to the hearing.

Decree reversed, and bill dismissed with costs,
up to the hearing.

[2d July 1839, 20th July and 10th August 1840.]

(On a Writ of Error from the Court of King's Bench.¹)

JOHN DOE, on the Demise of JOHN BIRTWHISTLE,
Plaintiff in Error.

AGNES VARDILL, Defendant in Error.

Statute of Merton—Heir by descent—Legitimation per subsequens matrimonium. — A child born in Scotland of unmarried parents domiciled in that country, and who afterwards intermarry in Scotland, though by the laws of Scotland capable of inheriting lands in that country, is not capable of inheriting lands in England.

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IN 1823 a bill was filed in the Court of Chancery by Birtwhistle, the plaintiff in error, against Vardill, defendant in error, for an account of rents of certain lands situate in the county of York, alleged to belong to the plaintiff in error, upon which the defendant in error had entered as guardian in socage to the defendant in error. Upon a motion for a receiver, Lord Eldon directed an ejectment to be brought; in 1825 the eject-

¹ The reporter was favoured with the argument in this case by Mr. Robinson.

ment was tried before Bayley, J., at York, and the jury, by a special verdict, found (amongst other things,) that Alexander Birtwhistle in 1790 went from England to Scotland, where he was domiciled, and continued there till his death in 1810; that he cohabited with Mary Purdie, who was domiciled in Scotland for the same period; that John Birtwhistle, plaintiff in error, was the only son of Alexander Birtwhistle and Mary Purdie; that he was born in Scotland in 1799; that in 1805 Alexander Birtwhistle and Mary Purdie were married in Scotland; that plaintiff, John Birtwhistle, was, by the law of Scotland, legitimate, and held lands in Scotland as heir to Alexander Birtwhistle. The Court of King's Bench held that John Birtwhistle was not capable of inheriting lands in England as heir of his father; and in 1830 the judges, upon a writ of error to the House of Lords, approved of that judgment. See 9 Bligh, N. S., 32.

On 2d July 1839 it was re-argued by one counsel on a side, in the presence of the judges, on a question proposed to the judges, and stated in the opinion given by Tindal, C. J.

The Attorney General for the Plaintiff.—The verdict of the jury has ascertained that the status and character of legitimate son of the party last seised in certain lands in England belong to the plaintiff in error; he is therefore, as the heir of that party, entitled to take by descent the land in dispute, but he is met by the plea, that inasmuch as he was not born at a time when his parents actually were in a state of lawful wedlock, his legitimacy as a general right, however undoubted, will not confer on him the requisite title to

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to take by descent land of which his father died last seised.¹

Mr. Dampier for Defendant in Error.—The question decided by the Court of King's Bench is one purely of English municipal law; it affects not the *jus gentium*; and the determination of it requires no aid from those foreign principles of law which are sought to be imported into its discussion. There are ample materials and decisions in the law of England for enabling this House to decide who is the heir entitled to take land by descent in England, and that too without raising any conflict with the laws of other countries.

This question is not new to the law; but may be held to have been authoritatively settled centuries since. The discussions anterior to the statute of Merton show, on the one hand, that the ecclesiastical courts, acting on the principles of the civil law, were cognizant of the rule as to legitimation *per subsequens matrimonium*, but that the attempts to introduce that as part of the municipal law of England failed; accordingly the King's courts never gave effect to it, and the statute of Merton put a period to the controversy.

Accordingly there is no instance of any foreign subject of the King of England seeking at any time to establish his right by descent to land in England by virtue of a subsequent marriage of his parents; and the absence of such cases is important in deciding a question now revived at this distance of time.

¹ Co. Litt. 7 b. *Sheddan v. Patrick*, 1st July 1803, Fac. Coll.; Affirmed, 3d March 1808. *Strathmore Peerage*, 4 Wilson & Shaw, App. p. 89; 2 Jac. & Walk. 547. *Ross v. Rose*, 4 Wilson & Shaw, 289. *Warrender v. Warrender*, 9 Bligh, 89; 2 Shaw & M'Lean, 154.

The rule itself is clear and express; viz., that the party must be the heir born ex justis nuptiis of his parents.

It is in vain to hold that that rule has been complied with in the case of a child born not ex justis nuptiis, but out of lawful wedlock; the admitted fact being that no marriage took place till after the child was in existence. It meets not this difficulty to say, that in England a child is born ex justis nuptiis though the marriage only takes place the day before his birth. Still the answer is obvious, that the requisites of a rigid and inflexible rule have been complied with, by the undoubted fact of the birth in such a case being subsequent to the actual marriage.

The defendant in error is not bound to go into the inquiry as to the rights of antenati in Scotland, and to what extent these have been sanctioned in England. One thing is evident, that the authorities are by no means agreed as to the origin and precise operation of the rule as to legitimation by subsequent marriage; and the very term "subsequent marriage" implies that it is not a correct view of the effect of it, to represent it as a marriage virtually occurring anterior to the birth.

But, without questioning the foreign law, it is sufficient to say that the law of England does recognize ex comitate the rules of other countries, so far as these do not interfere with positive existing rules in the law of real property in England. Accordingly the cases of *Ilderton v. Ilderton*, and *Crompton v. Bearcroft*, holding them to recognize Scotch marriages as good in this country, and as authorizing the widow's right to dower, may stand well with the law as settled by the King's

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Bench in this case; for these cases interfere with no fixed positive rule of English law; the argument ab inconvenienti can have no weight. There are, no doubt, many rights which the plaintiff in error may enjoy in England as the legitimate son of his father; but from these must be excepted the right to take by descent land of which the parent died seised and intestate.¹

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LORD CHANCELLOR. — Your Lordships have had the advantage of having had this case (raising certainly a very important question) argued with the utmost learning and ability; and it will be for your Lordships now to consider in what way the question is to be submitted to the learned Judges, in order to call their attention to the point to be decided. Upon looking at the question put to the learned Judges in 1830, it seems to me very accurately to state the facts of the case necessary to be submitted to the learned Judges, and it does not appear to me that it can be done better by putting it in other words. That question was in these words: "A. went from England to Scotland, and
" resided and was domiciled there, and so continued for
" many years till the time of his death. A. cohabited
" with M., an unmarried woman, during the whole
" period of his residence in Scotland, and had by her a
" son, B., who was born in Scotland. Several years
" after the birth of B., who was the only son, A. and

¹ *Costumier de Normand.* 27 b. note; *Regiam Majestatem*, b. ii. p. 51; *Kames's Equity*, b. iii. c. 8. p. 497; *Glanv.* b. vii. c. 15; *Fleta*, l. vi. c. 38; *Bract.* c. 5. p. 416; *Britton*, 12mo ed. p. 417; 1 *Reeves*, 464; 3 *Coleridge's Blackstone*, 336; 2 *Roper, Husband and Wife*, 445 note; *Co. Litt.* 33 a; *Selden, Diss. ad Flet.* c. 9. sec. 2; *Stamford, de Prerog. Reg.* p. 39; *Calvin's Case*, 7 *Coke*, 1 b.; *Vaughan*, p. 281; *Story's Conflict of Laws*, sec. 181; 1 *Hag.* 226; 2 *Hag.* 58, 106, 385; 2 *Doct. & Stud.* c. 35; *Co. Litt.* sec. 400.

“ M. were married in Scotland according to the laws
 “ of that country. By the laws of Scotland, if the
 “ marriage of the mother of a child with the father of
 “ such child takes place in Scotland, such child born in
 “ Scotland before the marriage is equally legitimate
 “ with children born after the marriage, for the purpose
 “ of taking land, and for every other purpose. A. died
 “ seised of real estate in England, and intestate. Is B.
 “ entitled to such property as the heir of A. ?” That,
 therefore, is the question I shall propose to your
 Lordships to submit to the learned Judges upon this
 occasion.

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Lord Brougham.—I entirely agree with my noble
 and learned friend that the question of 1830 is much
 better than any other which can be put ; it varies the
 point upon the facts stated in the special verdict ; that
 verdict did unfortunately not find particularly in every
 respect what the law of Scotland is upon this subject,
 consequently the argument of the learned counsel for
 the plaintiff in error pro tanto is damnified. It would
 have been better if it had been put as the learned
 counsel, Mr. Murray, stated it, whose evidence was
 believed by the judge and the jury, namely, that the
 marriage is supposed to have been antecedent to the
 birth by fiction ; but the legitimacy, as contradistin-
 guished from legitimation, is sufficiently put for the
 purpose of the argument, and with the assistance of the
 authorities it can leave very little doubt upon the minds
 of the learned Judges. Yet I cannot help expressing
 my regret at the length of time during which this suit
 has been pending. It was tried at York as long ago as
 1825, and I very well recollect the trial. The delay of

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fourteen years certainly is a very great misfortune; it has been owing in part to the changes in the custody of the Great Seal. In 1830 the appeal was certainly prosecuted, but it was not decided; and it was not till 1835 that we were aware of it being still depending. If I had ever known, whilst I held the Great Seal, that it was undetermined, I should have called the attention of the House to it, and then there would have only been the delay from 1825 to 1830. It was not noticed until another case brought it to your Lordships knowledge that it was not disposed of. Some laches too, probably, may be imputed to the parties. If they had reminded the House of it, no doubt the cause would have been heard; but I suppose there is something in the state of the property that did not make it very necessary, else they would have taken some means of obtaining an earlier judgment. I am desirous that the attention of the learned Judges should be directed to that, which, moved by the anxiety I felt upon the subject, I stated as the opinion I entertained in 1835, and to the arguments I then delivered. They have been printed, and will be furnished to the learned Judges. I do not know that they throw any great light upon the question, but they state the points, and refer to the authorities as well as to the principles. I entirely agree that this is a question of very great importance, and of very considerable difficulty. I quite agree with the Attorney General that it is of peculiar importance as affecting the law of Scotland, the question being, whether the *lex loci domicilii*, the *lex loci contractus et nativitatis*, or the *lex loci rei sitæ* should prevail in this case. From the time of Stair downwards,—from the time indeed when the distinction between real property and

personal arose,—the law governing the one being the *lex loci rei sitæ*, and the law governing the other being the *lex loci domicilii et contractus*. I feel great anxiety that this case should be well considered, for another reason; I mean out of regard for the credit of our English courts. I concur very much in the statement of the Attorney General, that if what has been laid down in this case be law, the bounds of that law are very narrow. If it is law any where it prevails assuredly only as the law within the bounds of Westminster Hall. I know wherever I go in Europe it is boldly denied to be the law. I know the opinion of Dr. Storey and other American jurists also is against us; and I do not think I could overstate the degree in which all those jurists dissent from the judgment in *Doe v. Vardill*. Moreover, if there is any reason to be given for the judgment, that reason is not in any one place. A considerable argument against it is to be gathered from the total diversity of the grounds upon which the judgment has at different times been maintained. It is first vested on one ground in the Court of King's Bench; then upon another and very different ground at the bar; here, in 1830, again, upon a third ground, which I think must be admitted on all hands to be untenable, the ground stated by Lord Chief Baron Alexander in giving the opinion of the judges to this House; and lastly, upon a different ground from all the three former, by the counsel to day at your bar. And if the judges are to give their opinions upon some fifth ground, the discrepancy may support the judgment better in their minds than it will support the judgment or give weight to it in the eyes of any other person; for assuredly a decision supported upon so many different grounds will be likely to

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sink low in the estimation of those who come to a calm consideration of its merits. I cannot help feeling the greatest regret that these questions should be raised here so frequently as they have lately been. Dispose of this as you may, we shall have no end to such cases, unless we adopt the only satisfactory mode that can be devised for settling such controversies and doubts, namely, by some legislative measure to relieve the law of this country from the opprobrium which now rests upon it in the eyes of all mankind. That there should be a set of questions incalculably important, perhaps the most important, to the interest and feelings of individuals which can ever arise in courts of justice, and that these questions should be left surrounded with doubt, and incapable of decision for want of some statutory enactment regarding these subject matters, is truly lamentable, and not a little opprobrious to our jurisprudence. Can any thing be more opprobrious to the law of a civilized country than that it should be extremely difficult to tell in this country whether a man is married or not? nay, what is worse, whether a woman is married or a concubine? that it should be still more difficult to tell whether a person, the issue of an unquestioned marriage, is a bastard or legitimate, and that, owing to the conflict of law or the discrepancy of the law, it should be declared in one part of the country that a man is a bastard and in another that he is legitimate,—in one part that a woman is married, and in another that she is a concubine,—in one part that divorce has taken place, dissolving a prior marriage, and if that person afterwards crosses the Tweed, and intermarries with another woman, he is deemed not to be in the honourable and comfortable state of wedlock, but in a state of felony, and having

committed bigamy he may be transported to Botany Bay, which actually has happened; and still more, that if the same party had intermarried again in Scotland he would be held to be in the honourable state of matrimony, and not of felony; but if he had English estates the question would arise, though the children were legitimate in Scotland, their birth-place, yet the law of the country where the property is situated declared them bastards, nay, that in only one court of England they were treated as bastards, and in all other courts acknowledged to be legitimate. There are peers sitting in this House affected by this question, the issue of noble families, their parents having been married in Scotland after previous divorces, they themselves being of the most spotless character and of the highest honour, possessing the most magnificent estates and the highest titles. It is just that question which is raised here, and which was assumed to be so clear at the bar,—though I interrupted the counsel to show it was any thing but clear,—that the current of decisions set in the opposite direction, and that the law would, if taken to be as so mis-stated, make these parties bastards who are now going about as legitimate children. It is a very horrid state of things, affecting the feelings and the character as well as the property of individuals, that there should be this uncertain state of the law. It is still worse to think, that all the learning and skill in Westminster Hall, if you were to consult it, and all the Scotch law in the Parliament House of Edinburgh, would not make you sure of getting two opinions to agree upon such questions as these. I hope this state of things will be put an end to. It never can be done satisfactorily without an act of parliament. You might say that a mar-

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country where the divorce is had to regulate the dissolution of the contract.

One word more before closing these observations. Being moved by the considerations to which I have adverted, I introduced a bill into Parliament in 1835 to cure the evil, and terminate so anomalous a state of things. I have been strongly urged to introduce it again. I own I had rather not do so pending this discussion, because I should hardly be able to accomplish my purpose without prejudicing this question, and I would therefore rather wait till it shall be decided. Now what is the real origin of all this embarrassment? a great deal arises from a country possessing one system of law being connected with a country possessing a different system, like Scotland and England, and these countries being contiguous. But much the greater part of the inconvenience has arisen from another source, and it shows the danger of departing from sound, solid, and uniform principles. If you had held originally that a marriage celebrated in Scotland, not *bonâ fide* by parties really resident there, but by parties who could not be duly married here, and who went to Scotland in fraudem legis Anglicanæ, to escape the provisions of the English marriage act, was a bad marriage in England,—if you had held, as you ought to have done by that opinion generally, and declared it was a bad marriage, and that you would not allow parties who could afford to go to Scotland for the purpose of evading the marriage act, and who were really the only people contemplated by that act, to escape its provisions by this Scotch journey,—if, instead of holding that to be a good proceeding, and giving it effect, you had said, as you have done in most other cases, “This is done in

“ fraudem legis, and shall not prevail,” then, nine parts in ten of the difficulties we now labour under would not have arisen. Lord Mansfield always held those marriages to be void in England. Instead of following his opinion, when *Crompton v. Bearcroft* came into Doctors Commons, it was decided in favour of the Scotch marriage. I have often lamented that we have no account of that important case, except in a passage of Mr. Justice Buller’s *Nisi Prius*. I applied to my late excellent and most learned friend Dr. Swabey, and he gave me a few notes, which showed how the case had arisen, namely, by letters of request from Lincoln, but threw little or no light upon the subject. The case does not seem to have undergone a thorough investigation; nevertheless it may have done so when it came to the delegates, a Court certainly of the highest authority. There, a judgment was pronounced in favour of the marriage, but on what argument or by what judges I know not. Then came *Ilderton v. Ilderton*, which first brought the question before a court of common law. If you look into that case, as reported in 2 H. Blackstone, you will find that the case of *Crompton v. Bearcroft* is cited. It was a writ of dower, to which ne unques accouple was pleaded, and there was a replication by the demandant of a marriage in Scotland, to which the tenant demurred. This demurrer was upon two grounds; the first denied the validity of a Scotch marriage in an English suit, and this ground was given up as an untenable point. The party never dreamt of arguing it, but confined the argument to another point, Whether there ought not to have been a place for the venue, and whether the replication ought not to have concluded with an appeal to the bishop’s certificate, instead of con-

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cluding to the country. The question upon the marriage was then abandoned, and the judgment makes no mention of it. Ever since that time the point has been held to be clear, that a Scotch marriage, however plainly and grossly in fraudem legis Anglicanæ, was a valid marriage. Now the evil arose originally from your having decided that; you went wrong in so deciding, as many of us think; but having once gone wrong, when other kindred questions arose, as upon the validity of Scotch divorces, you ought either to have retraced your steps, so as to get right again, or you should have continued acting upon the same principles; there was no middle course; either come back from your error in *Ilderton v. Ilderton* and *Crompton v. Bearcroft*, or go on upon the same principle; either hold that the going to Scotland in fraud of the English law ought not to avail in any way, or hold that the Scotch proceeding, however fraudulent, does avail; and if it makes the contract valid, that it also validates the dissolution of the contract. But instead of following up your error you chose to hold the marriage good, but the dissolution of the marriage bad; and see what interminable confusion you have thus got into. Now in *Lolly's* case the judges had an opportunity of retracting *Ilderton v. Ilderton* and *Crompton v. Bearcroft*, or they might have said, the cases have ruled that the marriage is good, then so must the divorce be. But instead of that they maintained the validity of a Scotch marriage, though in fraud of the English law, and yet they held that a Scotch divorce in the same circumstances is utterly invalid; and hence arise all the difficulties and disagreements by which we are now surrounded. I am sure this is a good reason why judges in deciding important questions should adopt the course,

when they have gone wrong, of at once, in an open and manly way, retracing their steps, rather than persist in their error; but if they do persist in their error they ought to do it out and out, though to the inconvenience of parties, and not, by way of saving their own consistency, impose on the people what is probably the most miserable of all inconveniences, that of vague and uncertain jurisprudence. Instead of having it uncertain, and subjecting people to this annoyance, it may be made at least intelligible by being made consistent, and though the principle were originally wrong, it may be made to tally with itself. At present it is inconsistent with itself; the principles are in one direction upon one ground, and in another direction upon another. I do hope that the result of this inquiry which has taken place will be the settlement of the law, and I cannot speak too highly of the ability with which the argument has been conducted. I entirely agree with my noble and learned friend, that it is impossible to say too much upon that subject; and the question having been thoroughly argued is ripe now for decision. I hope that when it is fully considered, we shall have the assistance of the learned Judges in giving our opinions. We shall give our opinions with all due deference to their authority, and all the disposition possible to avail ourselves of their useful aid, but without losing the regard that we conscientiously owe to our own opinions; not forgetting certainly the impression which may be made upon us by the opinion of the learned Judges, but coming to a full, calm, and deliberate consideration of a question of such paramount importance. When the law as it now stands has been thus settled, then ultimate steps may be taken, which

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I apprehend will alone be satisfactory to the people of both countries; I mean the final settlement of the law by an act of parliament, declaratory in some respects, and enacting in other respects; thus laying down what principles of law shall be fitting to be established for the two countries. I have felt it my duty to trouble your Lordships with these observations in the presence of the learned Judges and the parties, and I hope they may tend to the furtherance of justice in this case.

Ld. Wynford's
Speech.

LORD WYNFORD.—My Lords, I believe I am the only peer now present who was in the House at the time the question was put to the learned Judges upon the former occasion. That question was drawn up by Lord Lyndhurst, and submitted to the Judges. I approved of it then, and I approve of it now; I do not think any question can be put that will more effectually elicit the opinions of the learned Judges. I have a strong opinion upon this subject, which I have not hesitated to express upon other occasions; but if it should so happen that all the learned Judges agree in their opinion, it would be highly improper in me not to give way to them, as the Judges know I have upon several occasions; but if there is a difference of opinion among them, I shall take the liberty of stating my view of the question; at present all I shall say is, that I do not object to the question proposed to be submitted to the learned Judges. I wish my noble and learned friend to accomplish his object of reconciling the laws of Scotland and England in similar cases to this, but I am afraid that he will find very great difficulties in his way. I cannot help thinking that it might be better settled by different decisions as the matters arise; rather than by an act of par-

liament. I do not think that the legislature is well adapted to take up and settle a very difficult question like this. However, we shall, I hope, have an opportunity of fully considering the various points, as we always have in this place, particularly when assisted by the learned Judges, when cases come judicially before us. With respect to the question,—considering the circumstances which my noble friend has alluded to,—the way in which it affects different families in both countries, having large estates and high houses,—it is of the utmost importance it should be settled, and that it should be decided as soon as possible when the Judges have matured their opinion. It is of deep importance, when that matured opinion is come to, that an early period should be fixed for the consideration of the question. It must not be supposed that this is the only case which has stood over for a great length of time. The next case which stands for hearing, I am sorry to say, is a case that was before me in the Court of King's Bench when a judge of that court, now nearly twenty years ago. It was afterwards argued in this House, and judgment given, five or six years ago. I hope some mode will be adopted, when points of very great importance arise, of bringing them forward, so that the parties may obtain justice as soon as possible.

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TINDAL, C. J.—My Lords, the facts of the case upon which your Lordships propose a question to Her Majesty's Judges are these: A. went from England to Scotland, and resided and was domiciled there, and so continued for many years till the time of his death. A. cohabited with M., an unmarried woman, during the whole period of his residence in Scotland, and had by

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her a son, B, who was born in Scotland. Several years after the birth of B., who was the only son, A. and M. were married in Scotland according to the laws of that country. By the laws of Scotland, if the marriage of the mother of a child with the father of such child take place in Scotland, such child, born in Scotland before the marriage, is equally legitimate with children born after the marriage for the purpose of taking land and for every other purpose. A. died seised of real estate in England, and intestate. And your Lordships found this question upon the foregoing state of facts; viz., "Is B. entitled to such property as the heir of A.?" And in answer to the question so proposed to us, I have the honour to state to your Lordships that it is the opinion of all the Judges who heard the argument¹ that B. is not entitled to such property as the heir of A. We have, indeed, reason to lament that we have been deprived of the assistance of one of our learned brethren who heard this case argued at your Lordships bar, the late Mr. Justice Vaughan; but as he had expressed a concurrent opinion upon the case at a meeting held immediately after the argument, I feel myself justified in adding the authority of his name to that of the other judges.

My Lords, the grounds and foundation upon which our opinion rests are briefly these: That we hold it to be a rule or maxim of the law of England with respect to the descent of land in England from father to son, that the son must be born after actual marriage between his father and mother; that this is a rule juris positivi,

¹ Tindal, C. J.; Vaughan, J.; Parke, B.; Bosanquet, J.; Patterson, J.; Gurney, B.; Williams, J.; Coleridge, J.; Coltman, J.; Maule, B.

as are all the laws which regulate succession to real property, this particular rule having been framed for the direct purpose of excluding in the descent of land in England the application of the rule of the civil and canon law, by which the subsequent marriage between the father and mother was held to make the son born before marriage legitimate; and that this rule of descent, being a rule of positive law annexed to the land itself, cannot be allowed to be broken in upon or disturbed by the law of the country where the claimant was born, and which may be allowed to govern his personal status as to legitimacy upon the supposed ground of the comity of nations. My Lords, to understand the nature and force of this rule of our law, "that the heir must be a person "born in actual matrimony in order to enable him to "take land in England by descent," and to perceive at the same time the positive and inflexible quality of this rule, and how closely it is annexed to the land itself, it will be necessary to consider the earlier authorities in which that rule is laid down and discussed, both before and subsequently to the statute of Merton, and more particularly the legal construction and operation of that statute.

If we take the definition of heir which Lord Coke adopts from the ancient text writers, and which is borrowed originally from the Roman law (Co. Litt. 7 b.), viz., that he is "ex justis nuptiis procreatus," the very description points at a marriage celebrated according to the rules, requisites, and ritual of the civil or Roman law. "Operæ pretium est scire quid sint justæ nuptiæ," says Huber (lib. 23. tit. 2. de ritu nuptuum). He adds, "in promptu est Justiniani responsio: sunt eæ quæ secundum precepta legum contrahuntur." But to

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refer to the "Mirror of Justices," perhaps the very earliest of our text books, it is there laid down, in p. 70, as an admitted principle, "that the common law only taketh him to be as son whom the marriage proveth to be so." Glanville, who wrote in the reign of Henry the Second, (probably about half a century before the passing of the statute of Merton,) in book 7. chap. 13. states, that "neither a bastard, nor any person not born in lawful wedlock, can be, in the legal sense of the term, an heir; but if any one claims an inheritance in the character of heir, and the other party object to him that he cannot be heir because he was not born in lawful wedlock, then indeed the plea shall cease in the king's court, and the archbishop or bishop of the place shall be commanded to inquire concerning such marriage, and to make known his decision either to the king or his justices." He then, in chapter 14., gives the form of the writ, which will be found not unimportant to the present inquiry; (viz.)

"The king to the archbishop, health:

"W. appearing before me in my court has demanded against R., his brother, certain land, and in which the said R. has no right, as W. says, because he is a bastard born before the marriage of their mother; and since it does not belong to my court to inquire concerning bastardy, I send these unto you, commanding you that you do in the court christian that which belongs to you; and when the suit is brought to its proper end before you, inform me by your letter what has been done before you concerning it.

"Witness, &c."

Your Lordships will observe the form of this writ, how precisely it puts the objection against the heir's

title upon the very rule of the English law, "that he " was born before the marriage of his mother;" by which it is necessarily implied that the marriage of the parents had subsequently taken place. Now, if the question had been put generally on the fact whether any marriage had taken place, or upon the legality of such marriage as had taken place, to such a question of general bastardy, as it is called, the bishop would have found no difficulty in answering, for the answer to that question would have been purely and exclusively determinable by the spiritual law. But as the canon law, on the one hand, held the subsequent marriage of the parents made the ante-natus legitimate, and as the common law of England, on the other hand, held that such ante-natus was not legitimate for the purpose of inheriting land in England, if the question had gone in the general form the answer of the bishop would have certified such ante-natus to have been legitimate. The law, therefore, framed the question in the precise form contained in the writ, namely, a question of special bastardy, proving thereby how closely, and with how much jealousy, the law adhered to the rule of descent before pointed out. Now the question so framed did obviously place the bishop in extreme difficulty in making answer thereto; a difficulty which was very much increased by the constitution of Pope Alexander the Third, which had been issued very recently before the time when Glanville wrote, viz., in the sixth of King Henry the Second; by which constitution (in part set out by Lord Coke, 2d Institute, 96.) it was ordained "that children born " before solemnization of matrimony, where matrimony " followed, should be as legitimate to inherit unto their " ancestors as those that are born after matrimony;"

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and it is upon the subject of this constitution that Glanville is commenting in his 15th chapter, when he says, " Upon this subject it hath been made a question, " whether, if any one was begotten or born before the " father married the mother, such son is the lawful heir " if the father afterwards married his mother. Al- " though, indeed, the canons and the Roman laws con- " sider such son as the lawful heir, yet according to the " law and custom of this realm, he shall in no measure " be supported as heir in his claim upon the inheri- " tance, nor can he demand the inheritance by the " law of the realm. But yet if a question should arise " whether such son was begotten or born before mar- " riage, or after, it should, as we have observed, be " discussed before the ecclesiastical judge, and of his " decision he shall inform the king or his justices; and " thus, according to the judgment of the court christian " concerning the marriage, namely, whether the de- " mandant was born or begotten before marriage con- " tracted or after, the king's court shall supply that " which is necessary in adjudging or refusing the in- " heritance, respecting which the dispute is, so that by " its decision the demandant shall either obtain such " inheritance or lose his claim."

The bishops being placed in the difficulty of this conflictus legum, by reason of the precise form of the king's writ, at length, at the parliament holden at Merton in the twentieth of Henry the Third, the statute was framed which will be found to have a strong and direct application to the present question. That statute has not upon the original roll the title prefixed thereto, upon which observations were made at your Lordships bar, that it showed the intention of the law to have

been no more than to declare the personal status of those who are described in such statute. In the edition of the statutes published under the commission from the crown there is no other than the general title, "Pro-
" *visiones de Merton*;" and no more argument can justly be built upon the title prefixed in some editions of the statutes than upon the marginal notes against its different sections. That statute or provision of Merton runs thus; viz.,

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" To the king's writ of bastardy, whether any
" one being born before matrimony may inherit in
" like manner as he that is born after matrimony,
" all the bishops answered, that they would not nor
" could not make answer to that writ, because it was
" directly against the common order of the church;
" and all the bishops instanted the lords that they
" would consent that all such as were born afore matri-
" mony should be legitimate as well as they that be
" born after matrimony, as to the succession to inherit-
" ance, forasmuch as the church accepteth such as
" legitimate; and all the earls and barons with one
" voice answered, that they would not change the laws
" of the realm which hitherto have been used and ap-
" proved."

It is manifest from Bracton, who lived and wrote in the time of Henry the Third, that shortly after the statute of Merton this question of special bastardy ceased to be sent to the bishop, and became the subject of inquiry and determination in the king's courts. In book 5. c. 19., after stating the circumstances attending the statute of Merton, and also a subsequent council holden in the same year before the king, the archbishop, the bishops, earls, and barons, whose names

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he gives, it is ordered, that the words in which the writ shall go to the bishop shall be, whether such a one was born before espousals or marriage, or after, and that the ordinary shall write back to our lord the king in the same words, without any evasion or subtilty; and he then states it was further ordered at that council, that for the reasons before given and of such common consent it may be in the election of our lord the king whether he will demand that inquisition to be taken before the ordinary or in his own court, because when the exception is properly taken, the answer ought not to be obscure; and accordingly it will be found by reference to the year books, that from the time of Edward the Third the distinction became settled, that general bastardy shall be tried by the ordinary, special bastardy shall be tried per pais. (See the various authorities collected in Viner's Abridgment, title Trial, Bastardy.)

My Lords, the extent of the dominions of the crown at the time of the passing of the statute of Merton demands particular attention. Normandy, Aquitaine, and Anjou were then under the allegiance of the king of England, and had been so at least from the commencement of the reign of Henry the First. Many of the nobles and other subjects of the king had large possessions both in England and in the countries beyond sea. Those born in Normandy, Aquitaine, or Anjou, (as also in subsequent periods of our history, those born in Guienne, Gascony, Calais, or Tournay, whilst under the actual dominion of the crown,) were natural-born subjects, and could inherit land in England. (Calvin's case, 7th Coke, 20. b.) Many of the very persons who attended at the coronation of Henry

the Third, the occasion on which the parliament met at Merton and the statute was passed, both bishops and earls and barons are known from history, and would so appear from their very names and titles, to have been of foreign lineage if not of foreign birth, and were, at all events, well acquainted with the rule of law which was then so strongly contested, yet, notwithstanding the rule of the civil and the canon law prevailed both in Normandy, Aquitaine, and Anjou, by which the subsequent marriage makes the ante-natus legitimate for all purposes and to all intents; and, notwithstanding the precise question then under discussion was whether this rule should govern the descent of land locally situate in England, or whether the old law and custom of England should still continue as to such land, under which the ante-natus was incapable to take land by descent, there is not the slightest allusion to any exception in the rule itself as to those born in the foreign dominions of the crown, but the language of the rule is in its terms general and universal as to the succession to land in England. The question is, whether, after the declaration made by that statute, one of the king's subjects, born in Normandy, or Aquitaine, or Anjou, under the circumstances supposed by your Lordships, could have inherited land in England. It is not so much a parallel case with the present,—it is the very case itself, and it seems impossible to contend that such would have been held to be the law. In the first place, there is no other form of any writ to the bishop than the old form given in Glanville and Bracton, which raises the express point whether the claimant was born or not before espousals and matrimony of his father and mother. And if the question was brought before a

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jury, as afterwards became the course of proceeding, then there was no other than that precise issue which could be raised upon the record. Further, if the question was sent to the bishop, it must have been sent to the bishop of the diocese where the action was brought, that is, where the land was situate, and not to the bishop of the diocese where the party whose legitimacy is disputed was born, (see the Book of Assize 35, pl. 7,) which case seems not obscurely to indicate, that if the birth had been in France the trial would be still before the English bishop; for Skipwith, a judge of the Common Pleas, is made to say there, "you may carry your proofs before him in what place you please in England or from France." Again, the contest above adverted to was a contest between the antient law and custom of England on the one hand, and the canon law on the other, which should prevail as to the hereditary succession to land in England. The canon and civil law being acknowledged and prevailing in England in all other respects, with the single exception of its application to the descent of land, the same canon and civil law prevailing in the foreign dominions of the crown generally, and without any exception, there seems, therefore, no reasonable or probable ground for the surmise of any intention in the law makers of that day, that, with the general refusal and repudiation of this rule of the civil and canon law as to the hereditary succession to land in England, there should be a tacit exception in favour of a claimant born beyond the seas. Again, the law and custom would rather seem to be one which applies to the land itself, and not to the person only of the claimant. According to an observation of Bracton, in the place above cited, when discussing the

very point of the exception on the ground of bastardy, he says, "that every kingdom hath its own customs, "differing from those of others, for there may be one "custom in the kingdom of England, and another in "the kingdom of France, as to successions." And it would be singular indeed, if any such exception existed, that neither Bracton, who wrote with so much diffuseness on this very question, at the time of this notable refusal of parliament to alter the law, nor the author of *Fleta*, nor any of the other early writers, should have left the slightest vestige of or allusion to such exception in the rule.

On the contrary, the observation of Lord Coke, 2 Inst., 98., although not made in any case in a court of law, proves in a manner which leaves no doubt what would have been the opinion of that great lawyer upon the point now under discussion, if it had arisen in his time. "Some have written," he says, "that William "the conqueror, being born out of matrimony, Robert "his reputed father did afterwards marry Arlot his "mother, and that thereby he had right by the civil "and canon law; but that is *contra legem Angliæ*, as "here it appeareth." This is, in effect, saying, that although born in Normandy, and legitimated in Normandy by the subsequent marriage of his father and mother there, so that he could inherit land in Normandy, yet as to land in England he could not take it by descent, for the same would be the law of descent of a kingdom, and of the land within it. This is the very case now put to the Judges by your Lordships. It, therefore, appears to be the just conclusion from these premises, that the rule of descent to English land is,

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that the heir must be born after actual marriage of his father and mother, in order to enable him to inherit; and that this is a rule of a positive, inflexible nature, applying to and inherent in the land itself which is the subject of descent, of the same nature and character as that rule which prohibited the descent of land to any but those who were of the whole blood of the last taker, or like the customs of gavelkind or borough English, which cause the land to descend in the one case to all the sons together, and in the other to the younger son alone.

And if such be, as it appears to us to be, the rule of law which governs the descent of land in England, without any exception either express or implied therein on the score of the place of birth of the claimant, it remains to consider whether by any doctrine of international law, or by the comity of nations, that rule is to be let in by which B. being held to be legitimate in his own country for all purposes must be considered as the heir at law in England.

The broad proposition contended for on the part of the plaintiff in error is, that legitimacy is a personal status to be determined by the law of the country which gives the party birth, and that when the law of that country has once pronounced him to be legitimate, he is by the comity of international law to be considered as legitimate in every other country also, and for every purpose; and it is then contended, that as by the Scotch law there is a *presumptio juris et de jure*, that under the circumstances supposed, the parents of B. were actually married to each other before the birth of B., so such presumption of the Scotch law by

which his legitimacy is effected must also be adopted and received to the same extent in the English Courts of Justice.

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Now, there can be no doubt but that marriage, which is a personal contract, when entered into according to the rites of the country where the parties are domiciled and the marriage celebrated, would be considered and treated as a perfect and complete marriage throughout the whole of Christendom :

But it does not therefore follow, that with the adoption of the marriage contract the foreign law adopts also all the conclusions and consequences which hold good in the country where the marriage was celebrated.

That the marriage in question was not celebrated in fact until after the birth of B. is to be assumed from the form of the question. Indeed, except on that supposition, there would be no question at all. Does it follow then, that because the Scotch hold a marriage celebrated between the parents after the birth of a child to be conclusive proof of an actual marriage celebrated before, a foreign country which adopts the marriage as complete and binding as a contract of marriage must also adopt this consequence? No authority has been cited from any jurist or writer on the subject of the law of nations to that effect; nothing beyond the general proposition, that a party legitimate in one country is to be held legitimate all over the world. Indeed the ground upon which this conclusion of B.'s legitimacy is made by the Scotch law is not stated to us, and we have no right to assume any fact not contained in the question which your Lordships have proposed to us. We may however observe, that, in the

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course of the argument at your Lordships bar, the ground has been variously stated upon which the laws of different countries have arrived at the same conclusion. It was asserted, that, by the law of Scotland, the subsequent marriage is not to be taken to be the marriage itself, but only evidence, though conclusive in its nature, of the marriage prior to the birth of B.,—that the canon law rests the legitimacy of the son born before such marriage upon a ground totally different, viz., that, having been born illegitimate, he is made legitimate—*legitimus*—by the subsequent marriage, by a positive rule of law, on account of the repentance of his parents; whereas by the Scotch law a marriage previous to his birth is conclusively presumed, so that he always was legitimate, and his parents had nothing to repent of. Pothier, on the other hand, (*Contrat de Marr. Part. V. ch. 2. art. 2.,*) when he speaks of the effect of a subsequent marriage in legitimating children born before it, disclaims the authority of the canon law, nor does he mention any fiction of an antecedent marriage, but rests the effect upon the positive law of the country. He first instances the custom of Troyes: “*Les enfans nés hors mariage de soluto et solutâ, puis que le père et la mère s’espousent, l’un l’autre succèdent et viennent à partage avec les autres enfans, si aucuns y a;*” and then adds, “that it is a common right received throughout that kingdom.”

Now, it could never be contended by any jurist that the law of England, with respect to the succession of land in England, would be bound to adopt a positive law of succession like that which holds in France, the distinction being so well known between laws that relate to personal status and personal contracts, and those

which relate to real and immoveable property, for which it is unnecessary to make reference to any other authority than that of Dr. Story, in his admirable Commentaries on the Conflict of Laws (see sections 430. et seq., where all the authorities are brought together); and if such positive law is not upon any principle to be introduced to control the English law of descent, what ground is there for the introduction into the English law of descent, not only of the contract of marriage observed in another country, which is admitted to be adopted, but also of a fiction with respect to the time of the marriage, that is, in effect, of a rule of evidence which the foreign country thinks it right to hold?

But admitting for the sake of argument, and we are not called upon to give our opinion on that point, that B., legitimate in Scotland, is to be taken to be legitimate all over the world, the question still recurs, whether, for the purpose of constituting an heir to land in England, something more is not necessary to be proved on his part than such legitimacy? And if we are right in the grounds on which we have rested the first point, one other step is necessary, namely, to prove that he was born after an actual marriage between his parents; and if this be so, then, upon the distinction admitted by all the writers on international law, the *lex loci rei sitæ* must prevail, not the law of the place of birth.

My Lords, in the course of the discussion some stress appears to have been placed on the argument, that if B. had died before A. the intestate, leaving a child, such child might have inherited to A., tracing through his legitimate parent; and then it was asked, if the child might inherit, why might not the parent himself inherit? But the answer to that supposed case appears

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to be, that if the parent be not capable of inheriting himself, he has no heritable blood which he can transmit to his child, so that the child could not under the assumed facts have inherited, and the question, therefore, becomes in truth the same with that before us. The case supposed would be governed by the old acknowledged rule of descent,—“Qui doit inheriter al père doit inheriter al fitz.”

My Lords, the two decided cases that have been relied upon in the course of argument, that of *Sheddon v. Patrick*, and that of the *Strathmore Peerage*, do not, upon consideration, create any real difficulty. Those cases decide no more than that no one can inherit without having the personal status of legitimacy, a point upon which all agree; but they are of no force to establish the main point in dispute in this case, viz., that such personal status is sufficient of itself to enable the claimant to succeed as heir to land in England.

Upon the whole, in reporting to your Lordships, as the opinion of the Judges, “that B. is not entitled to the real property as the heir of A.,” I am bound at the same time to state, that, although they agree in the result, they are not to be considered as responsible for all the grounds and reasons on which I have endeavoured to support and explain such opinion.

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LORD CHANCELLOR.—The subject upon which your Lordships have had the opinion of the Judges is of so much importance, and the learning contained in that able opinion is of such a description, as, in my opinion, to require further consideration. I shall, therefore, propose to your Lordships that the further consideration of the case be postponed.

LORD BROUGHAM.—I perfectly agree in opinion with my noble and learned friend. It is quite impossible to express more strongly than I desire to do the obligations which I think your Lordships and the bar are under to the learned Judges for the very able elaborate, and lucid opinion they have given.

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It is perhaps enough to say, respecting this opinion of the learned Judges, that in a case which has undergone argument in every form for somewhere about twelve years past, both in the sister kingdom and here,—first in the different courts of Westminster Hall, and next at your Lordships bar,—upon which the learned Judges in the courts below, upon former occasions, in deciding the question submitted to them, and the learned Judges here, in assisting your Lordships, have given their opinions, and discussed the points,—nevertheless, at the eleventh hour as it were, and at the very end of this long-continued discussion, very great new light, if I may express it, has been thrown upon the question by the reasonings of the learned Judges, and very important additions have been made by the arguments to-day to those arguments and that learning which had been brought to bear upon that question in its former shape, in your Lordships House, in Westminster Hall, and in the courts of Scotland.

Under these circumstances it is not for me to say that the opinion, or rather the leaning of opinion, which it is well known to your Lordships I formerly expressed, is not materially altered by the quite new form in which the argument is now placed. I am by no means prepared to state that I shall not, on reconsidering the reasons of the learned Judges now submitted, find a sufficient answer to the difficulties which formerly

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pressed upon me, which I very fully stated to your Lordships, I think, in the year 1835.

Upon these grounds I entirely agree in thinking that the further consideration of this case ought to be postponed. I ought to add, that in the whole of the first part of the reasoning of the learned Judges I was prepared to agree. What I have doubted is the latter part of the reasoning. One thing has struck me, that, supposing your Lordships shall ultimately be of opinion that you ought to decide in favour of the defendant in error, and to affirm the judgment of the Court below, it will be absolutely necessary that the legislature should interfere, in order to allay the evils which will arise out of the conflict of law, respecting the personal status in the two parts of the kingdom.

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LORD BROUGHAM.—This was an ejectment brought to recover lands situated in Yorkshire; and a verdict being taken, subject to a special case for the opinion of the Court of King's Bench, (from which the record came,) with leave to either party to turn it into a special verdict, it came before this House by writ of error, and was twice argued; first in 1830, when the Judges attended and gave their opinion through the Chief Baron (Sir William Alexander); and again in 1838, when your Lordships also had the assistance of the Judges, who have now given their opinion, through the Chief Justice of the Common Pleas. The question raised by the special verdict, and argued upon these several occasions, is this, whether a person born in Scotland of parents domiciled there and married there, but after his birth, and who, by the law of Scotland,

is legitimate in consequence of that subsequent marriage, can take real estate in England as heir. The Court below held, that he could not, and the Judges have all agreed in this opinion.

When, in 1835, I took the liberty of calling the attention of your Lordships to this question, I pointed out what appeared to me to have been material defects in the argument, both below and here, on the part of the defendant in error,—that is, in support of the judgment below. The learned and elaborate opinion last given by the Judges has made very valuable additions to the clear and able, though more succinct statement, given upon the former occasion. It is now for your Lordships finally to dispose of the case; and I deem it my duty to offer a few remarks upon the subject, on account of its great importance, and more especially of the bearing which the principles connected with it, and about to be recognized in your decision, must almost unavoidably leave upon other questions.

While I willingly acknowledge the great value of the assistance which we have received from the learned Judges upon this occasion, I feel convinced that there are several matters which still remain to be considered, and some difficulties to be got over, before we can with perfect confidence rely upon the conclusion at which they have arrived. But I shall rest satisfied with referring generally to the scope of the argument which I submitted to your Lordships upon the former occasion, 1835, and with observing that a considerable portion of it is left untouched by the present argument of the learned Judges; and that I, on the other hand, should find it not difficult to reach a conclusion the opposite of theirs, while I yet admitted a very large portion of

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their positions. In the observations which I am about to offer upon their argument, I purposely abstain from any thing more than thus generally referring to its scope, as contrasted with that of the opposite reasoning. What I wish further now to state relates to the detail of their statement, and must be taken as independent of any general answer to it, for which I refer to what I before submitted to your Lordships.

The authorities cited by the learned Judges, especially in the earlier part of their opinion, do not seem conclusive; as, for example, Lord Coke's definition of heir, "ex justis nuptiis procreatus," and the text in the Mirror, "that the law only taketh him to be a son "whom the marriage proveth to be so." These and other authorities only prove the dependence on and connexion of legitimacy with marriage, or of inheritable quality with marriage, which in no part of the argument ever could have been denied. The text in Glanville seems at first to take the distinction between legitimacy generally or absolutely, and legitimacy by being born in lawful wedlock, as connected with right to inherit; for it says, "neither a bastard, nor any "person not born in lawful wedlock, can be an heir." But in a subsequent chapter the writ is given, and that sets forth the denial by the demandant of the tenant's right, because he is a bastard, born before marriage of the parents, which seems to indicate that the marriage was required to precede the birth, only in order to negative the bastardy. The writ indeed adds, "that it does not belong to the temporal court "to inquire concerning bastardy, wherefore it is sent "to the court christian."

It is said that the law frames the writ for the purpose

of preventing the court christian from answering the question according to the canon or civil law. Nevertheless, the bishops were not compelled by the exigency of the writ to confine themselves to the question, whether the party was born before or since the marriage, because the bastardy is introduced in terms, as well as the birth and marriage.

A council, however, was held soon after the parliament of Merton, and at that council it was directed that the writ should merely require the ordinary to examine the date of the birth, and, whether before or after marriage, to prevent, as is said "any evasion or "subtily" on the part of the ecclesiastical authorities.

The argument of the learned Judges upon the statute of Merton is deserving of great attention ; nor can I at all go along with those who have contended, both in the Court below and here, that it is not a statute, but a refusal to make a statute. Such was the contention of the learned Chief Justice in the able argument which he held, when at the bar in the King's Bench, against the decision. This statute is only different from other statutes, inasmuch as it is in substance declaratory, and in form somewhat different from that of declaratory acts in modern times. It is a distinct declaration of what the law had ever been before the statute, and a refusal to alter it. But it is to be observed, that the bishops, in calling for the alteration, put their demand expressly on the ground, that ante-nati are legitimate by the canon law ; and it is in consequence of their legitimacy that the bishops claim the recognition of their right to inherit. The barons only affirm that such ante-nati had no right of inheritance by the common law, without saying whether, by the common law, they

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were legitimate or not,—though assuredly the common law is understood to be declared by the statute against their legitimacy universally and in all respects, as well as with respect to feudal inheritance. But I agree that it somewhat aids the views taken by the learned Judges, when we find that special bastardy ceased, from the time of the statute, to be tried by the bishop, and has ever since been tried per pais.

It may be remarked, that the proceeding appears, from the Grand Coustumier, c. 27., to have been a writ of bastardy general, directed to the ordinary; but the description of bastards there given is worthy of attention:—"Tous ceulx sont bastards qui sont engendres hors marriage;" and then immediately it goes on to say, "mais ceulx qui furent engendres devant le mariage, si le pere espouse depuis la mere, ils sont tenus legitimes." So that, apparently, though born de facto out of wedlock, they were, in contemplation of law, born within wedlock. It may be further observed, that Littleton, section 188., in treating of villenage, gives, as the reason why a bastard is quasi nullius filius, that he cannot be heir to any "pur ceo que il ne poit enheriter à nulluy."

The learned Judges object to the observations made at the bar upon the title prefixed to the chapter in question of the statute, namely, that this title showed the enactment only was intended to be a declaration of the personal status. "This title," say the learned Judges, "is not to be found in the original statute;" and they refer to the edition published by the Record Commission, where *Provisiones de Merton* is the only heading of the act; and they add "that no more argument can justly be built upon the title prefixed

“ in some editions, than upon the marginal notes “ against the different sections.” If, however, the learned counsel at your Lordships bar were led into any error in this matter, they had very high example in going astray, no less than that of the Court below, whence this writ of error is brought, and where, when the cause was first decided, one of the learned Judges (5 Barnewall and Cresswell, 453,) argued in support of the decision now under revision, on the ground of the heading or title. “ We have no occasion,” (says Mr. Justice Bayley,) “ in order to answer the question, “ who is hæres?—we have no occasion to go beyond “ the statute, in order to answer that question; the “ title of it is, ‘ He is a bastard who is born before the “ ‘ marriage of his parents,’ not restricting it to those “ born in England.” For myself, I consider the assistance to be equally slender which the one argument and the other derives from this title, even supposing it to have been the one given by the legislature to the chapter of the act, which it appears not to have been; indeed, it could not have been, for no titles at all were put on statutes till the 11th Henry 7., as is said by Treby, Chief Justice, in *Chance v. Adams*; *Hardwicke*, 324.

I am inclined to regard, as the most important part of the argument of the learned Judges, their observations on the state of the crown dominions at the making of the statute. This point had been made in the Court below, but without much explanation, and not much dwelt upon. The Lord Chief Justice (Abbott) takes it, though only in general terms, yet quite intelligibly (5 Barnewall and Cresswell, 452). The learned Judges here have very usefully explained the argument, and

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illustrated it by important remarks ; they have contended that an ante-natus within the king's legiance, but born in Normandy, (which, by the way, had, for above thirty years before the statute, ceased to be English de facto, though it was not formally ceded till twenty-five years after,) Aquitaine, and other provinces where the civil law prevailed, could not have inherited lands in England under the statute,—chiefly because no exception is there made per expressum of such persons, although the connexion of the countries would naturally call the attention of the legislature to the case, and because no tacit or implied exception can be supposed in favour of the canon law for Norman subjects of the crown, when the express words of the act refuse to adopt the same canon law for English subjects of the crown. The silence of contemporary writers, as Bracton, and the author of Fleta, is very justly referred to in aid of the same conclusion. The other reasoning of the learned Judges on the passage of Bracton, and which, as well as the reference to the customs of gavelkind and borough English, was urged below, seems there to have met with a sufficient answer in the argument at the bar ;—that those authorities apply to English parties, and those customs to the rule of succession; none of which matters are disputed ; so that the authorities may well stand with the opposite argument. No doubt, if the fact of being born within lawful wedlock be as much a necessary quality to the character of heir by the custom of England, as the fact of being youngest heir is to being heir by the custom of borough English manors,—if that fact, of being born within lawful wedlock, can only be judged of according to the English law, and admits of as little dispute as the fact

of being eldest or youngest child,—there is, and there must be, an end of the question; but unless these things are so, the cases put have no useful application to the one in hand.

So of the proposition repeatedly affirmed below, and now largely stated by the learned Judges here, that the law or custom is something inherent in the land, a quality of the land itself, as it were, and not of the claimant. This of course would, in one sense, decide the question, but then it would beg it also. In any other sense it leaves the question untouched, for the dispute would still arise, what description of person is that to which the descendible quality of the land carries it?

The argument drawn by the learned Judges from the observation of Lord Coke, in the 2d Institute, 98, on the title of William the Conqueror, had been used in the Court below; 5 Barnewell and Cresswell, 448. The passage is not very clear. But when Lord Coke says, that some held William the Conqueror to have had right by the civil and canon law, in consequence of the subsequent marriage of his parents, he is, I presume, supposed to mean right to the crown of England as nearest maternal relation to Edward the Confessor, which he certainly was, being grandson of his maternal uncle Richard of Normandy. That this could give him no right to the exclusion of the male branch represented by Edgar Atheling, the Confessor's great-nephew, and who, being grandson of his elder brother Edmund Ironsides, had indeed a title paramount, that of the Confessor himself, is quite clear. And although the Conqueror appears to have called himself rex hereditarius in some charters, historians and antiquaries are agreed that

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this could only mean heir under the supposed will of the Confessor; for the only dispute as to his title that has ever been raised is, whether he took by the sword or as conqueror by purchase, (Spelman's Glossary, vide Conquestor), under the supposed will or gift of the Confessor, about the existence of which much controversy has always been held. As to his taking as heir by inheritance, no person has ever asserted his title; and if he took under the Confessor's gift or will, his legitimacy was really of as little importance as it was to the other and more secure title which he derived from his sword. If, indeed, Lord Coke, or rather those whom he refers to, for any reason supposed the male branch to be extinct, then we can understand the passage, always supposing that a mother's relatives could succeed; and in that case the passage might bear upon the argument; or it may bear upon it if we suppose Lord Coke puts the case hypothetically, or refers to some who did consider the male branch settled in Hungary extinct. Still this seems not very intelligible; for it is believed that Edward the Confessor had called them over as his end approached,—that his nephew Edward, the outlaw or exile, came back, and died here; but, wherever he died, it is quite certain that he left Edgar Atheling, his son, who was notoriously in England at the conquest, and was made to join in some proceedings to confirm William's title, and afterwards was engaged in an unsuccessful rebellion against him. The passage, therefore, is really not very easily explained, nor is any light thrown on it by the reference to the authorities cited: William of Malmesbury, B. III.; Ingulphus, lib. VI. cap. 19.; and the Grand Coustumier, cap. 27. The first of these, at the place referred to,

only says, that William's father married his mother,—*aliquandiu justæ uxoris loco habuit* (scil. Arlottam); and the second reference (to Ingulphus) seems erroneous, for there are no books and chapters in Ingulphus, at least in any editions which we now have, or which are known ever to have existed; but all that he says of William (who was his patron, and of whom he writes largely, and in praise and defence,) is, that the Confessor, aware of Edgar's weakness, turned his thoughts towards William, taking into consideration "*cognationem suam*," an expression which he repeats afterwards. The text of the Grand Coustumier (which is the third reference) merely gives the law of bastardy and legitimation generally; nor can I see any reference to William's case in the Commentaries; though I will not undertake to say there may not be some such reference. In the text cited by Lord Coke there is certainly none, and in the Commentary I can find none; but the difficulties do not end here, because, even if Edgar were set aside for imbecility, still the Conqueror was not next heir, for he was only the Confessor's cousin-german by the mother once removed (Welch nephew, as we say, or nephew *à la mode de Bretagne*, as the French have it; and this accounts for some writers calling the Confessor cousin and some uncle to the Conqueror); whereas Edgar's sister, afterwards married to Malcolm in Scotland, was his great niece by his elder brother. And, moreover, we have now been all along supposing that the connexion of William with the Confessor, through the mother of the latter only, made no difference; whereas, suppose the whole paternal relations had been extinguished, it is difficult to see how upon any feudal principle any person could

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inherit who was not of the blood of the English royal family. William's only connexion with England was, that his aunt had been married to an English king; consequently it seems quite impossible to understand how he ever could be considered as having right, even on the supposition that the lawful course of succession was by nomination and selection from among the whole members of a given royal family. Subject to these observations, we may perhaps consider this passage in Lord Coke as some kind of indication of his opinion, always supposing the passage to be correct. But there can be little doubt that these observations make it exceedingly uncertain whether Lord Coke ever wrote it as we now have it,—in a work too, be it observed, which was not published in his lifetime. If there were no such uncertainty hanging over the passage its importance to the argument would be undeniable; it would amount to neither more nor less than Lord Coke's opinion upon the case at bar. But it is probable that some such considerations as those to which I have been adverting, operated in preventing any attention being paid to this authority in the Court below, where it was cited, but occasioned no remark, either at the bar or from the bench.

The learned Judges refer to the illustration drawn from a person supposed to claim through the ante-natus, he having predeceased his father; and they hold this to be disposed of by the opinion given on the principal case or question, inasmuch as, if incapable of inheriting himself, he could not transmit heritable blood to his issue; and, generally speaking, no doubt it would be so, although contrary to Lord Coke's supposed opinion as to issue of aliens inheriting to each other collaterally, it

has been decided that a brother may succeed to a brother, the only connexion of the two being through an alien father who had no inheritable blood, (*Collingwood v. Pace*, 1 *Levinz*, 59,) where the opinion generally ascribed, and, among others, by Blackstone, to Lord Coke, is denied by the majority of the Judges to be his, and by none of them affirmed to be so. But a nearer case to the present may be put, where, by the law of the country, as in Scotland and on the Continent, legitimization per subsequens matrimonium is admitted, it seems that the authorities are agreed in holding that if the ante-natus dies before the marriage of his parents, leaving lawful issue, the issue shall take as heir to his grandfather, though he must claim through a person who lived and died illegitimate.

Nor is this case of one who never could himself be heir, transmitting inheritable blood to his issue, confined to those countries and that law of legitimization. We have an example in our own law in the case of bastard eigne, and it is worth while to consider how this is treated, though I know not that it materially impeaches the general conclusion to which the argument of the learned Judges leads them, unless by showing how entirely the law proceeds upon the supposition that it is his bastardy, and his bastardy only, which excludes the ante-natus from succession.

Littleton, in sections 399 and 400, says, that the issue of the bastard eigne who, having entered, died seised, shall have the land, by reason of a colour to enter as heir to his father; "for by the law of holy church he is mulier, albeit by the law of the land he is bastard."

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Lord Coke, in commenting upon the words of Littleton, that in such a case the mulier puisne is "without remedy," says, that the descent from the bastard eigne not only takes away the entry, like other descents which leave the party to his action, but makes the issue of the bastard become lawful heir, adding that even if the mulier be within age he is barred, because the bastard's issue is become in judgment of law lawful heir. "For the law," says he, "doth prefer legitimization before the privilege of infancy." Collateral heirs too are barred as well as the mulier, and the bastard becoming a monk professed, which is a civil death, has the same effect; his issue succeeds during the natural life of the bastard, and the legitimate heir is barred. In the 2d Institute, Lord Coke, as a confirmation of the doctrine, gives the record of a judgment in the 18th Edward the First, showing that the mulier cannot have an assize of mort d'ancestor, and upon the ground that the bastard eigne has entered as heir; and the reason assigned by Lord Coke is that the bastard is accounted of the blood with the mulier puisne. (2d Institute, 97.) But in Coke, Littleton, 244 b, he puts the case which has been referred to from the law of Scotland and the Continent, of the bastard eigne dying in his father's lifetime, and, leaving issue, this son enters as heir to the grandfather, and dies seised; the mulier is barred. "The descent," says Lord Coke, "binds him." Now this cannot be from the laches of the mulier during the bastard's life, for, by the supposition, nothing had been done by the bastard to make the mulier claim, nor could he claim, for the grandfather was still alive. The laches was in the grandson's life; so that here the reason given

for the law fails, viz., that it is unjust to treat a person all his life as legitimate, and bastardize him after his death; for here the ante-natus never was treated as legitimate at all; he lived and died a bastard, yet his issue claiming through him who had no inheritable blood, entered as heir to the common ancestor, and, by dying seised, barred the lawful issue. Although, however, this consideration somewhat contradicts the answer given by the learned Judges to the argument at the bar, it yet furnishes another answer to that argument, by showing that if it proves any thing, it proves too much, since, in the case of bastard eigne, there is no question whatever of his right being excluded in the common case, (of English marriage, birth, and domicile,) unless where there has been an entry and dying seised without counterclaim.

The short observation made by the learned Judges on the cases of *Sheddan v. Patrick*, and of the *Strathmore* peerage, appears hardly to be satisfactory. "These cases," it is said, "only decide that no one can inherit without the personal status of legitimacy, and do not show what is alone in dispute, that such personal status is sufficient ground for claiming English real estate as heir." It appears that these cases establish somewhat more than the first of those positions, and, although they do not decide the second, they appear to give it much countenance. They show that the quality, whatever it is, that must be possessed by a claimant, in order that he may take land or honours in Scotland, is given to or withheld from him according to the law, not of Scotland, where the

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real estate lies, but of the country where his birth and his father's marriage and domicile were. Whether that quality be called legitimacy, or any thing else, is not material; nor is it material whether the quality is required in relation to the property by some positive statutory enactment of the country where it lies, or only by the common law of that country, or by some statute (like that of Merton) which declares what the common law always has been. The land in Scotland is impressed with a particular quality, that of being descendible to the ante-nati where the parents have intermarried; it is of such a nature as not to descend upon the mulier puiane, but upon the bastard eigne; while, in England, it is of such a nature as to descend to the mulier, and not to the bastard. The one quality is as firmly fixed in the soil of Scotland, as the other is in that of England. Then what have the Courts, and what has this House, decided in those celebrated cases? That notwithstanding the inherent descendible quality, and notwithstanding the general rule of the *lex loci rei sitæ*, so much relied on by the learned Judges, both below and here, through their whole argument, the law of the country where the property is must bend to the law of the domicile, marriage, and birth; and because the latter law excludes ante-nati from legitimacy, they shall be excluded from the succession to which the former law calls them. The Scotch common law says, "Let the land go to the ante-natus, such is its descendible quality." The English common law says, "Let the land not go to the ante-natus." The question, and the only question, is, have we a right to look beyond the fact, or to ask any but one question, namely,

whether a person is ante-natus or post-natus, whether his parents were married or not at his birth? Are we bound by the simple fact, or may we look to the view taken of it by the law of the foreign country to which the claimant and his parents belonged? The decided cases say, in the instance of Scotland, that we may and must look to the foreign law; that the subsequent marriage is immaterial for succession in Scotland, if it is immaterial for legitimation in the claimant's country; and the question is, whether, according to the principle of these decisions, it is possible to exclude all reference to the foreign law, where the same kind of question arises as to English succession? It is very possible that the principle of the cases may be inapplicable; this may, possibly, be proved by argument, but it can hardly be said to have been proved by the only remark made on these cases in the statement of the learned Judges; and this scanty discussion of those cases is the more to be lamented, because, in deciding the present question, the Court below expressly referred to this House as the place where *Sheddan v. Patrick* and the *Strathmore peerage* would meet with ample attention as to their bearing upon this argument.

The learned Judges have given no opinion upon the question, whether or not a person legitimated by subsequent marriage in a country where that law prevails is, therefore, legitimate all the world over; nor, perhaps, was it incumbent on them to argue this for the purpose of answering the question put to them by the House. They contend that the statute, or rather the common law recognized and declared by the statute, requires something beyond mere legitimacy to make an

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heir to English real estate. They agree with the Court below that legitimacy alone is not sufficient; it must be, as was there said, (5 Barn. and Cress. 454,) legitimacy sub modo, legitimacy and being born in wedlock. Consequently they appear plainly to admit that a person may be legitimate for all other purposes, and yet incapable of taking land by descent; that we ought not to say "a man's eldest lawful son is his heir at law" but his eldest lawful son, if born in lawful wedlock.

In another case, *Munro v. Munro*, (1 Robinson's Appeal Cases, 492,) which has been decided to-day, we held here, as it had been held in the Court below, that a party is entitled to take real estate by descent as legitimate according to the law of the country where it lies, who is bastard by the law established in the country of the birth and marriage. In the courts which administer the law, (the law of England in the case put,) would the party be considered as bastard or as legitimate, where any right unconnected with real property was claimed? If bastard, then the same person is legitimate in one country and not in another; bastard where born, and legitimate where the parents are domiciled; though some of the Judges, with whom we agreed in that case, held this to be a solecism in law, considering it clear that the status must be everywhere the same. If legitimate, then it follows that the question of personal status depends on the law of foreign countries, and that the law is imported into England as to the consequences of the marriage contract, although the *lex loci contractus* alone regulates the constitution of that contract.

But, which way soever we may hold as to these questions, the principles of the two decided cases referred to are quite consistent with that of the last-mentioned case decided to-day. They are not so easily reconciled to the judgment at present before your Lordships.

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Having stated what occurs to me upon the arguments of the learned Judges, again expressing my high sense of the service which they have rendered by the great attention bestowed upon the subject, I rest satisfied with intimating my opinion upon the difficulties which still beset the question, and the anomalies likely to arise from the future application of the principles countenanced in the decision; and though I shall not move your Lordships to give judgment for the defendant in error, if my noble and learned friends move, I shall offer no opposition.

LORD CHANCELLOR.—I was not in your Lordships House when this case was first argued, but I was present at the argument when the learned Judges were present, and I gave my attention to the opinion expressed by the Lord Chief Justice, and I entirely concur in that opinion. I am extremely satisfied with the ground upon which they put it; because they put the question on a ground which avoids the difficulty which seems to surround the question, of interfering with those general principles peculiar to the law of England, and which seem at first sight to interfere with the decisions to which the Courts have come. Under these circumstances, as my noble and learned friend does not move the judgment for the defendant

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in error, I move, that judgment be entered for the defendant in error.

Ordered, That the said Judgment given in the said Court of King's Bench be and the same is hereby affirmed; and that the record be remitted, to the end such proceeding may be had thereupon, as if no such writ of error had been brought into this House.

[30th July and 10th August 1840.]

(From the Court of Chancery.)

The Right Honourable CHARLES PHILIP Earl of
HARDWICKE, Appellant.

Sir CHARLES EURWICKE DOUGLAS, Respondent.

Mr. Charles Yorke by his will, after giving several legacies, gives the residue of his estate to trustees, in trust to pay the income to his wife for life, and after her death to transfer the residue to Sir Charles Douglas. By a codicil, after giving specific and pecuniary legacies, there is the following clause:—"All the rest and residue of my property not herein-before (or by my will or any other codicil) disposed of, I give and bequeath to my nephew Charles Philip Yorke, and to Sir Charles Eurwicke Douglas, Knight, their executors, administrators, and assigns, after the death of my wife, equally to be divided between them."—Held, that the residue of the testator's property passed under the residuary clause of the codicil, and revoked the gift of the residue bequeathed by the will;—Lord Lyndhurst and Lord Brougham concurring; the Lord Chancellor dissentiente, and being of opinion that nothing passed under the residuary clause of the codicil, the whole of the residuary property being disposed of by the will.

THE Right Honourable Charles Philip Yorke, by his will dated the 19th of April 1827, which was attested by three witnesses, after bequeathing to his wife the sum of 500*l.*, to be paid to her within six calendar months next after his decease, and the use of either his house in Bruton Street, London, or at Bon-

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ningtons in Hertfordshire, together with the furniture belonging to it, for her life, directed that the whole of the sum of 12,000*l.* in pursuance of a power given him for charging his brother Lord Hardwicke's estates with that sum, should be raised and paid to his executors as soon as conveniently might be after the decease and failure of male issue of Lord Hardwicke, and that it should be considered as part of his general personal estate. The will then proceeds as follows :

“ And I give and bequeath the said sum of 12,000*l.* so
“ herein-before charged by me upon the estates of the
“ said Philip Earl of Hardwicke as aforesaid, and also
“ all my leasehold estates in Bruton Street and at Bon-
“ ningtons aforesaid, or elsewhere ; and all my monies,
“ securities for money, stock in the public or govern-
“ ment funds or annuities, household goods, furniture,
“ plate, linen, china, pictures, prints, books, goods,
“ chattels, and other personal estate and effects, what-
“ soever and wheresoever ; and all my estate, right,
“ title, and interest therein and thereto respectively ;
“ but subject nevertheless and without prejudice to the
“ bequests herein-before contained and made unto or
“ in favour of my said wife Harriet Yorke for her life
“ and otherwise as aforesaid ; and also subject to the
“ payment of my just debts, and funeral and testa-
“ mentary expenses, and such legacies as I may here-
“ after give or bequeath by any codicil or codicils to
“ this my will, unto my said dear wife Harriet Yorke,
“ and my excellent friends the aforesaid Charles Wil-
“ liam Manningham, Sir Edward Hyde East, William
“ Martin Leake, and Thomas Atkinson, and their
“ executors, administrators, and assigns, upon the trusts,
“ and to and for the intents and purposes herein-after

“ expressed and declared of and concerning the same ;
 “ that is to say, upon trust that they the said Harriet
 “ Yorke, Charles William Manningham, Sir Edward
 “ Hyde East, William Martin Leake, and Thomas
 “ Atkinson, and the survivors and survivor of them,
 “ and the executors, administrators, and assigns of such
 “ survivor, do and shall forthwith, or as soon after my
 “ decease as they, she, or he shall think proper or ex-
 “ pedient, make sale and dispose of such parts of my
 “ said leasehold and residuary personal estates and
 “ effects respectively as are or shall be in their nature
 “ saleable ; and collect, get in, and receive such parts
 “ thereof as are not or shall not be in their nature
 “ saleable ; and do and shall lay out and invest the
 “ monies to arise from such sale or sales, and so to be
 “ collected and received as aforesaid, in their, her, or his
 “ names or name, in some or one of the public stocks
 “ or funds, or in or upon real or government secu-
 “ rities in England, (with full power to alter, vary, and
 “ transpose such stocks, funds, and securities, or any
 “ other stocks, funds, or securities, subject to the trusts
 “ of this my will, from time to time, at their, his, or her
 “ discretion,) and do and shall stand and be possessed
 “ of and interested in the said stocks, funds, and securi-
 “ ties ; and also of and in all such part and parts of my
 “ said residuary personal estate and effects as shall consist
 “ of stocks, funds, or securities at my death, and every of
 “ them respectively, upon the trusts, for the intents and
 “ purposes, and under and subject to the provisoes and
 “ declarations herein-after declared or expressed of and
 “ concerning the same, that is to say, upon trust during
 “ the life of my said wife Harriet Yorke, to receive and
 “ pay to her, the said Harriet Yorke, or permit and

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“ suffer her to retain and keep, to and for her own use
 “ and benefit, all the dividends, interest, and annual
 “ proceeds of or to arise from the said several stocks,
 “ funds, and securities, trust monies and premises, and
 “ every of them, and every part thereof respectively,
 “ when and as such dividends, interest, and annual pro-
 “ ceeds shall from time to time become due and payable;
 “ and from and after the decease of my said wife
 “ Harriet Yorke, upon trust to assign, transfer, and
 “ pay all the said stocks, funds, and securities, trust
 “ monies and premises, and every of them, and every
 “ part thereof respectively, unto my natural son Charles
 “ Eurwicke Douglas, (wishing him to use the name of
 “ Eurwicke only,) his executors, administrators, and
 “ assigns, for his and their own absolute use and benefit,
 “ in case he the said Charles Eurwicke Douglas shall
 “ be living at my death, and shall then have attained,
 “ or shall afterwards live to attain, the age of twenty-five
 “ years, or be married, with the previous consent of
 “ my said wife Harriet Yorke, during her life, or
 “ after her decease, with the consent of the said Charles
 “ William Manningham, Sir Edward Hyde East,
 “ William Martin Leake, and Thomas Atkinson, or
 “ the survivors or survivor of them, his executors or
 “ administrators.”

The testator then proceeded to dispose of his residuary property, in case the respondent had died in his lifetime, or under the age of twenty-five, without having been married with consent, to (the appellant) his nephew Charles Philip Yorke, in case he should be living at his death, with divers contingent limitations over in case of his death; and appointed Mrs. Yorke executrix, and the other trustees executors, of his will.

By deed poll, dated the 3d May 1827, subject to a power of revocation therein contained, after reciting that he had transferred into the names of trustees 4,655*l.* 7*s.* 0*d.* new 4 per cent. annuities, 500*l.* 4 per cent. annuities, 3,529*l.* 8*s.* 3*d.* 3 per cent. reduced annuities, 1,600*l.* 3 per cent. annuities, and 40*l.* long annuities, it was declared that they should stand possessed of the same, upon trust to pay the dividends to the testator for life, and after his decease to transfer the same to the respondent in case he should attain the age of twenty-five, or be married with consent.

By deed poll, endorsed on the last-mentioned deed poll, dated the 30th November 1832, the testator, after reciting that the 40*l.* long annuities had been sold, and the proceeds invested in 1,142*l.* 17*s.* 2*d.* reduced 3½ per cent. annuities in the names of the trustees, and that he had since invested 664*l.* 17*s.* 7*d.* 3½ per cent. annuities in the names of the trustees, with the intention that the same should be held upon the same trusts as the bank annuities within mentioned, but that no declaration of the trusts thereof in writing had been made, revoked the trusts of the within-written deed poll declared concerning all the stocks and funds then vested in the names of the trustees, and declared that the trustees should stand possessed thereof in trust for the testator, his executors, administrators, and assigns.

By a settlement, dated the 22d of December 1832, made in contemplation of a marriage, which was afterwards had, between the respondent and Mary Ann Des Vœux, the testator vested in the names of trustees the several sums of 5,320*l.* 4*s.* 7*d.* new 3½ per cent. annuities, 1,600*l.* 3 per cent. consolidated annuities, 3,529*l.* 8*s.* 3*d.* 3 per cent. annuities, 500*l.* 4 per cent.

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annuities, and 1,142*l.* 17*s.* 2*d.* 3½ per cent. annuities; and covenanted, that his heirs or executors should, after the decease of himself and Mrs. Yorke, pay to the trustees of the settlement 10,000*l.*, upon trust that they should stand possessed of the several stocks and 10,000*l.*, for the benefit of the husband and wife for their lives, and after their decease for the benefit of the issue of the marriage. Miss Des Vœux's fortune was 7,000*l.*, and was put into settlement.

On the 1st of May 1833, Mr. Yorke made a codicil to his will, attested by three witnesses, which had been prepared by his solicitors, whereby he not only confirmed the charge of 12,000*l.*, mentioned in his will, upon the property specified in his will; but likewise charged all his brother's estates which he had power to charge with the payment of that sum, and directed that it should not be raised during Mrs. Yorke's life, provided interest at the rate of 4 per cent. was punctually paid. He directed that 5,000*l.*, part of the charge of 12,000*l.*, should be paid, after the death of Mrs. Yorke, to the trustees named in the respondent's marriage settlement, in part satisfaction of his covenant for payment of 10,000*l.*; and directed that the remainder should be paid out of his general personal estate; that 2,000*l.* should be paid to Thomas Atkinson and the respondent, upon certain trusts; and that 5,000*l.*, residue of the sum of 12,000*l.*, should not be raised if any son or grandson of his late brother, Sir Joseph Sydney Yorke, should be entitled in possession to the estates charged therewith, and that they should be altogether discharged from the payment of that portion; and that if the 12,000*l.* had been raised during Mrs. Yorke's lifetime, or after her decease, then he

directed, that in the event of such son or grandson of Sir Joseph Sydney Yorke being so entitled as aforesaid, that the said sum of 5,000*l.* should be applied by his trustees towards the discharge of any incumbrances affecting the same estates, or in the purchase of other property, to be settled in the same manner as the estates charged; and he “ratified and confirmed his” said will in every other respect whatsoever.”

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On the following day Mr. Yorke made another codicil to his will, dated 2d May 1833, which commences as follows:—“This is a codicil of specific and “pecuniary legacies, to be also added to my will.” By this codicil he desires that his body may be opened, or that a surgeon should be employed to perform such short and decisive operation upon it as might ensure his being really dead, and that for his trouble he should be paid 10*l.* upon the spot; and desires that he may be buried at Wimpole, as near as may be to his dear and lamented brother Sir Joseph Sydney Yorke. He added the name of Sir Charles Eurwicke Douglas to the number of his executors, and bequeathed to such of them as should act the sum of 20*l.* for mourning. To several relations he gave pecuniary legacies, to be paid to such of them as should be living at Mrs. Yorke’s death; amongst the number is a legacy of 100*l.* to the appellant. The testator then bequeathed several small annuities to different persons, to be paid half-yearly; the first payment to be made on the first usual quarter-day that might happen after his decease; and directs, that as they should respectively cease, they should fall into and become part of his personal estate and its residue. After bequeathing certain gilt plate given to him by his constituents, and gilt candlesticks which he had

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added to it, and certain silver inkstands and candlesticks which came to him as secretary-at-war, and pictures of Lord Chancellors Hardwicke and Somers and of Sir J. S. Yorke, and crayon drawings by his mother, and his maps, plans, and charts, with his Egyptian and hieroglyphical engravings, drawing books, and tracts, and all his classical and other books relating to ancient literature, (except duplicates, which he gave to Sir C. E. Douglas,) upon trust, for the possessor of Wimpole of his name and blood, to be used and enjoyed in the nature of heir-looms, and after desiring his wife, after his decease, to dispose of the diamonds, jewels, and trinkets which came from his family, after her decease to the future wife of the appellant, or to his niece, or to one or more of the wives of his nephews, as she might prefer, and after giving an antique ring, which belonged to his grandfather Johnson, to his eldest nephew, and a broad gold ring with a motto to Sir E. H. East, and that with a scarabæus and title of Thothmos of Egyptian pebble to W. M. Leake, and mourning rings to various other persons, and to servants who had lived three years with him two years wages and mourning, he gives all his swords and other arms to Sir C. E. Douglas, together with his gold watch, chain, and seals, and the sum of 100*l.*, to be paid to him as soon as convenient after his decease. Then follows the following clause: "All
" the rest and residue of my property, not herein-before
" (or by my will or any other codicil) disposed of, I
" give and bequeath to my nephew Charles Philip
" Yorke, and to Sir Charles Eurwicke Douglas,
" Knight, their executors, administrators, and assigns,
" after the death of my said dear wife, equally to be
" divided between them; and I leave it at the option of

“ Sir Charles Eurwicke Douglas to assume or not the
 “ name of Eurwicke singly, or to bear it as at present,
 “ without alteration. Signed by me, C. P. YORKE.
 “ May 2d, 1833.”

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On the 13th March 1834, the testator, Mr. Yorke, died without issue, leaving his brother the Earl of Hardwicke, since deceased, and his nephew (the appellant) next heir presumptive to the earldom, and to the estates upon which the sum of 12,000*l.* was charged.

Shortly after Mr. Yorke's death, William Martin Leake, Thomas Atkinson, and the respondent duly proved his will and codicils, with the usual power to the other executors likewise to prove them, when they should think fit; and the personal estate was ascertained to be of considerable amount and value, greatly exceeding what was necessary to pay and satisfy his debts, funeral and testamentary expenses, and the legacies and annuities which he had bequeathed.

On the 4th of July 1834 the respondent filed his bill in the Court of Chancery, against William Martin Leake, Thomas Atkinson, Harriet Yorke, and the appellant, stating that he, the respondent, was entitled to the whole residuary personal estate after Mrs. Yorke's decease; and praying that the usual accounts might be taken, “and that the clear residue of the testator's personal estate and effects might be ascertained, and
 “ might be invested and secured upon the trusts of the
 “ said will, and that the rights and interests of the re-
 “ spondent, and of all other parties, in or to the same,
 “ might be ascertained and declared.”

To this bill the several defendants appeared, and put in their answers. The appellant, in his answer, insisted

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that he "was entitled to an equal share of the testator's
"residuary estate with the respondent, on the decease
"of Mrs. Yorke, under and by virtue of the second
"codicil."

The cause being at issue, and having come on to be heard on the 16th of November 1835 before the Master of the Rolls, on the 19th of November 1835 his Honour declared, "That, according to the true construction of
"the will of the Right Honourable Charles Philip
"Yorke, the testator in the pleadings of this cause
"named, and of the codicils thereto, dated respectively
"the first and second days of May 1833, the plaintiff" (respondent) "was entitled to the clear residue of the
"said testator's personal estate, subject to the life interest therein of the defendant, Harriet Yorke; and
"ordered that the plaintiff's bill should stand dismissed
"out of court, as against the defendant, Charles Philip
"Earl of Hardwicke," (the appellant,) with costs. The costs of the appellant, and all parties to the suit, to be paid out of the testator's personal estate.

Against this decree the Earl of Hardwicke, the present appellant, has brought this appeal.

Appellant's
Argument.

Mr. Pemberton for the Appellant.—The question is, who is entitled to the residue? Between the date of the will and codicils several events had happened; Sir C. Douglas had attained twenty-five, had married with the consent of Mr. Yorke, who had made upon his marriage an irrevocable settlement, and Sir Joseph Yorke had died, all which circumstances might have induced the testator to have made a different disposition by his codicil from what he had made by his will. The

effect of the first codicil is to take 7,000*l.* out of the residuary clause, and to make his nephew share equally with Sir C. Douglas, in respect of the 12,000*l.*; by the second codicil he has given an equal share of the residue to his nephew. He gives by his codicil to the possessor of Wimpole several specific articles, which, under the will, would have gone to Sir C. Douglas; the predominating consideration in his mind was to benefit the name and blood to which he belonged. What would be the use of giving Sir C. Douglas 100*l.* legacy, if he intended that he should remain residuary legatee under the will? By his will he wishes him to take the name of Eurwicke; by the codicil he leaves it to his own option, no longer considering him as his representative. If the residuary clause in the codicil does not take effect, it is a clause which is totally inoperative.

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Mr. Wigram for the Respondent.—No inference ought to be drawn, from slight circumstances, to control the express words of a will. By the will all the specific articles were directed to be sold; they were not given specifically to Sir C. Douglas. Sir C. Douglas's wife's family might have objected to the change of name. By the second codicil he adds the name of Sir C. Douglas as an executor; by the first codicil Sir C. Douglas is deprived of 7,000*l.*, the reason for which may be on account of the wife's fortune amounting to that sum. If he intended a greater benefit to his nephew, why did he not discharge the estates from the whole of the 12,000*l.*? Whenever he intends to make a serious disposition of his property he calls in his solicitor; then is it not probable that, if he intended to alter the whole residuary bequest, he should have called in his solicitor

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to make the second codicil? The gift of 100*l.* to the nephew, after the death of Mrs. Yorke, is not consistent with giving him half the residue. He says, this is a codicil of specific and pecuniary legacies; the residue is not a specific bequest or pecuniary legacy. It is doing great violence to the words of the codicil if you do not give effect to the words, "not herein-before disposed of " by my will."

Appellant's
Argument.

Mr. Pemberton in reply.—It is agreed, if the residue passes under the will, that the residuary clause in the codicil is inoperative. The two codicils are to be considered as one instrument confirming his will, except as to the residue, which he divides. In construing an instrument you must give an interpretation to every clause. A revocation may be express or implied; express, where there is a direct revocation; implied, where a subsequent codicil makes a gift inconsistent with the gift made by the will; and it is not a revocation of the whole of the residuary property given by the will, but only of the moiety.

10th August 1840.

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LORD BROUGHAM.—The question in this appeal arises upon the construction of the will and codicils of the late Mr. Yorke, brother of the half blood of the late Earl of Hardwicke, uncle of the whole blood of the present Earl the appellant, and putative father of the respondent, and it turns mainly upon the concluding paragraph or clause of the second codicil.

The case appears to stand thus: there are legacies in the will, and there is a gift of the residue. There are legacies in the codicil, and there is then the clause in

question. "All the rest and residue of my property,
 "not herein-before (or by my will or any other codicil)
 "disposed of, I give and bequeath to my nephew
 "Charles Philip Yorke, and to Sir Charles Eurwicke
 "Douglas, Knight, their executors, administrators, and
 "assigns, after the death of my said dear wife, equally
 "to be divided between them. I leave it at the option
 "of Sir Charles Eurwicke Douglas to assume or not
 "the name of Eurwicke singly, or to bear it as at
 "present without alteration."

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It is certain that the testator had the will before him when the codicils were made, particularly that he had it before him when the second codicil was made, when he wrote it, which he did himself. It is more particularly clear that when he added the clause in question he had before him the gift of the residue in the will, for he makes an alteration in one portion of the residuary clause in the will, videlicet, a direction respecting the name to be borne by the respondent.

Then take the terms of the clause "all the rest and residue of my property;" thus far all is plain. The question is, whether these residuary words are altered by what follows, "not herein-before disposed of;" this too would still raise no doubt, because by "herein-before" he means "in the second codicil," as seems plain from the words which come immediately after, "or by my will or any other codicil;" but it makes no difference if the two codicils are taken as one, and then "herein-before" means both the codicils together, and has no reference to the will. Now, neither in the one codicil nor the other is there any thing like a residuary gift before the clause in question, therefore there can no doubt be raised as to the sense of the words "all the

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"rest and residue of my property," by the qualification "not herein-before disposed of," and, consequently, up to this point all is plain enough. But he adds "or by my will," and the question is whether these words do no qualify the preceding ones, or except from the gift the residue given by the will; if they do they wholly annul the words and destroy the gift. The testator had the residuary gift in the will before him, therefore to support this construction it must be contended that being aware of having given the residue in the will, he says, in the codicil, "all the residue other than the residue already given," or "all the residue over the residue already given," which is not a sensible construction. If we read it "all the residue other than or over the legacies given," it is only tautology, but a very usual tautology. If we take the clause as a gift with an exception, "all the residue of my property, except what I have given in my will," we must read the exception so as not to destroy the gift, or suppose it is not a gift with an exception, but only a qualification in a description of the thing given. Still it is more reasonable, and more according to all just rules of construction, to give such a sense to the qualification as shall not make the whole a nullity.

The one construction makes the testator give "all the residue of his property, over the particular legacies given in the will and codicils," which is a sensible construction, and leaves something for the words to act upon. The other construction makes him give all the residue over the legacies, and over all the residue, that is, all that remains after the legacies, and after what remains over these legacies, which is not a sensible construction, and leaves nothing whatever; and it is mate-

rial to observe that this is not a mere mistake of the testator, or an eventual defeat of his intention. It is not that he may have supposed he was giving something by the words when he had nothing to give, but the construction assumes him to have intended this absurdity, for he had the former residuary clause before him; and, therefore, if he meant by the reference to the will a reference to that clause, so as to qualify by such reference the residuary gift now made, he must have known that he was making an exception or qualification which left nothing to give, and must have been aware of the absurd construction. It seems very difficult to suppose that he would frame a clause of this kind.

The clause is framed with sufficient care, and indicates that he was aware of giving something material by it. He gives the thing, whatever it is, with reference to the time of it vesting in possession, namely, after the death of his wife, to whom he had before given it for her life, and he gives it to the parties, their executors, administrators, and assigns, to be equally divided between them.

It seems a less strained construction to take the words in the parenthesis, as they have now been taken, than in the sense put on them below, and it seems a less violence to the instrument to hold, that the testator, having before him the residuary gift in the will, altered it in the manner supposed, than to hold that he made a gift to the parties in equal moieties of what amounted to nothing, and could not possibly amount to anything. The alteration which the construction now put on the clause supposes, is in the persons who are to take an interest in the residue expectant upon the determination of the life interest given to the wife. By the will the residue, after

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the wife's life interest, had been given to one of the parties; the codicil gives it to both equally.

I abstain from entering into any of the other arguments connected with the case, and from one or two observations which might be made in support of the view now taken, for this reason: the substance of what has been now stated was reduced into writing, and agreed to by Lord Lyndhurst and myself, and we both deemed that it led to the conclusion at which, after considerable doubt, we have arrived. It was the conclusion to which we were inclined at the first hearing. The doubts occurred afterwards, but we now consider them to be removed. In these circumstances, as Lord Lyndhurst is absent, I prefer only stating the argument which he has seen, and in which he concurs, although there has been no difference of opinion between us upon any of the other less important matters, yet those not having been reduced to writing, and considered by us in that shape, I have thought it better to omit them.

The consequence of this is, that in concurrence with my noble and learned friend, who is unavoidably prevented attending to-day, I would move your Lordships to reverse the decree below, and to make a declaration, different from that which was made below, as to the true meaning of the will and codicil, by substituting for that a declaration that the true meaning of the codicil is, that the appellant and respondent should take it equally divided; and to reverse the part of the decree which dismisses the appellant from the suit. The accounts must of course go on; in fact that is not appealed from. The only part appealed from is the declaration.

LORD CHANCELLOR.—My Lord Lyndhurst and my noble and learned friend having come to a conclusion upon these testamentary papers in favour of the present appellant,—as the opinion which I have formed differs from that at which they have arrived in their superior judgment,—I think it right, as it involves a question of principle, to state to your Lordships the ground on which I originally formed an opinion in favour of the respondent, and on which I still consider that that is the sound construction of these testamentary papers.

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I think it is much more probable that the conclusion to which my noble and learned friend has come is consistent with what the testator intended. I think the great probability is, that having by his will given the residue to Sir Charles Douglas,—what he intended to do by his codicil was, instead of giving the whole residue to him, to divide it between him and another object of his bounty,—the difficulty is how far we are justified in coming to a conclusion which shall give effect to that probable intention; and I must say, I find no words in this codicil which can lead to such a conclusion. It is more from the situation of the parties, and the probability of the case, that I infer that that probably was the intention of the testator, than from any thing I find in the testamentary papers; but if the words do not bear it, it is contrary to all rule to speculate upon the intention, for the ground of the conclusion ought not to be found in any thing but the expressions which are used.

Now what actually is the state of the testamentary disposition? He gives the residue by the will to trustees, in trust to pay the income to his (the testator's) wife

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for her life, and after her death to transfer the residue to Sir Charles Douglas; in the event of Sir Charles Douglas dying under a certain age to go over,—that, however, is immaterial, because he attained that age; then by his codicil he gives various descriptions of property to different persons, money legacies to some, and specific articles to others; and then comes this clause:—"All the rest and residue of my property, not herein-before (or by my will or any other codicil) disposed of, I give and bequeath to my nephew Charles Philip Yorke and to Sir Charles Eurwicke Douglas, Knight, their executors, administrators, and assigns, after the death of my said dear wife, equally to be divided between them." In construing these words the obvious course is to look back to the will, to see what property there is not, by that or by any other codicil, given; because to that subject-matter the testator has by this codicil confined himself. Now if you look back you will find there is no property that is not included in the will, because there is a clause in the will which carries with it all the property. The result is, undoubtedly, therefore, that if the construction to be naturally put upon this residuary clause in the codicil be adopted, there are two residuary clauses, not a very uncommon thing to be found in a will. It frequently happens that there is found such a residuary clause, and that for greater caution, and to avoid the possibility of not having included some things, you find words which, though altogether of a general residuary kind, are not intended to apply to an antecedent gift. Then there is no ambiguity in these words; they become useless if the residuary clause in the will is to take effect; these fail, not from any ambiguity in the ex-

pressions used, but because the subject matter is disposed of by the residuary clause in the will.

It is not, according to my impression of the rules upon which the Courts have acted, consistent with the principles of construction, to set aside the effect of clear and unambiguous words, because there is reason to suppose that they do not produce the effect which the testator intended they should produce. If there be an ambiguity, then, of course, it is the duty of all Courts to put that construction upon the words which seems best to carry the intention into effect, but if there be no ambiguity, however unfortunate it may be that the intention of the testator shall fail, there is no right in any court of justice to say those words shall not have their plain and unambiguous meaning. Taking this clause by itself, there can be no difficulty in coming to a conclusion, because what he gives is what is not given by any codicil or will. Under these circumstances, what appeared to me before appears to me still, that, however probable it may be that putting this construction upon the words may effect the intention of the testator, the words are of that character and description that they do not open the door to carry out any intention which is not to be found in the words so used.

There is also considerable difficulty in supposing the testator to have intended to have revoked the former clause, because the residue, by the will, was given to trustees upon trust; and what he might have intended to do, and, I think, very probably did intend to do, was to say, that that interest which Sir Charles Douglas would have taken under the will, I intend to give equally between him and Sir Charles Yorke, that would be the object which the testator must be presumed to have

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had, if the construction which my noble and learned friends put upon this clause, in order to carry out the supposed intention of the testator, is to prevail. Certainly the words employed do not, in my opinion, indicate any such intention; if one were to take the trouble of seeing how he would have expressed that intention which is now contended for, and what would be the way of carrying it into effect, meaning to revoke what he had given to any individual, and then intended for that individual and another, he would naturally have revoked that disposition, and have given all the rest and residue of his property, which rest and residue had been given to trustees, the ultimate trust being in favour of Sir Charles Douglas, to the trustees, for the benefit of those he then meant to favour. • Under these circumstances, I certainly have not been able to see that the expressions used are so flexible, and so capable of being adapted to the intention supposed to be entertained by the testator, as to justify the construction which my noble and learned friends have thought themselves at liberty to adopt, but which, if adopted, would very likely carry his intentions into effect.

Decree reversed, and cause remitted, with declaration.

[*4th June and 11th August 1840.*]

(From the Court of Chancery, Ireland.)

GEORGE JACKSON, Appellant.

ROBERT JACKSON, ELIZABETH MAUNSELL, and MARIA
MAUNSELL, Respondents.

A father being tenant for life of a certain estate held upon lives, with power of appointment amongst one or more of his children, by deed of the 14th January 1804, appoints to his son, in tail male. By deed of the 18th January 1804, the father and son, in consideration of 1,600*l.*, to be applied in paying interest of debts upon the estates, and of fines due for the renewal of the lives on the estates, demise part of the estate for the lives therein named, and for lives which might afterwards be added. By lease and release of the 10th and 11th December 1807, in consideration of the debts paid by the father for the son, the son reconveys to the father the estate which had been appointed to the son.—Held, that from the circumstances of the two first deeds being executed nearly at the same time, of the father's debts being provided for out of the estate, and of the son's restoring the estate to the father, there was so much doubt as to the validity of the appointment, notwithstanding a recital in one of the deeds, that the father had paid the debts of the son, as to make it necessary to inquire into the validity of the appointment.—Decree reversed, and inquiry directed.

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BY a settlement dated 22d June 1780, made previously to a marriage afterwards had between William Marcus Jackson and Jane Devereux, after reciting that William Jackson was seised of and entitled to two several freehold interests, the one in the lands of Moylish, and the other in the lands of Clonlara, both in the north liberties of the city of Limerick, by virtue of two several leases for lives thereof respectively, with covenants for perpetual renewal, he conveyed the same unto trustees, their heirs and assigns, upon trust for William Marcus Jackson for life, and after his decease (charged with a jointure of 50*l.* for Jane Devereux) to the use of all and every or such one or more of the children of the said William Marcus Jackson by the said Jane Devereux, and for such estate or estates in tail male, and in such parts, shares, and proportions, manner or form, as William Marcus Jackson should, by deed or will, appoint; and in default of appointment, or as to such parts whereof no appointment should be made, to the use of the first son of the said William Marcus Jackson by the said Jane Devereux, and of the heirs male of the body of such first son, with remainder to the use of the second and all and every other the son and sons of the said William Marcus Jackson by the said Jane Devereux, severally and successively, in tail male, with several remainders over.

There was issue of the marriage four sons, William Devereux Jackson (since deceased) the eldest son, George Jackson (the appellant) the second son, the respondent Robert Jackson the third son, and Thomas Jackson (since deceased) the fourth son, and no other issue.

William Marcus Jackson, in pursuance of the power

given him by the settlement, by a deed poll dated the 14th January 1804, appointed the lands of Moylish with the appurtenances, to William Devereux Jackson, and to the heirs male of his body.

By indenture of lease dated the 18th January 1804, and made between William Marcus Jackson and William Devereux Jackson of the one part, and Nicholas Mahon, gent., of the other part, in consideration of 1,600*l.* paid by Nicholas Mahon to William Marcus Jackson and William Devereux Jackson, they the said William Marcus Jackson and William Devereux Jackson did demise unto the said Nicholas Mahon, his heirs and assigns, part of the lands of Moylish, as therein particularly described ; to hold the same unto Nicholas Mahon, his heirs and assigns, for the lives of the several persons therein named, as cestuisque vies, and the survivor of them, and for the lives and life of such other person or persons as should for ever thereafter be added to that demise, pursuant to the covenant for perpetual renewal therein contained, at the yearly rent of 110*l.*, payable half-yearly, as therein mentioned. And in the said indenture is contained a covenant by the said William Marcus Jackson and William Devereux Jackson, for themselves, their heirs and assigns, with the said Nicholas Mahon, his heirs and assigns, for the perpetual renewal of the said lease, at the costs and charges of Nicholas Mahon, on payment or tender of a pepper-corn for every new life to be added. And it was by the said indenture agreed, that so much of the said sum of 1,600*l.* as should be sufficient should be laid out and applied by the said William Marcus Jackson and William Devereux Jackson, first, towards paying off, satisfying, and discharging all the debts by specialty

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judgment, or otherwise, affecting the estate of the said William Marcus Jackson ; secondly, towards defraying the costs and expenses of renewing the lease for three lives, which he the said William Marcus Jackson held of the said lands of Moylish from the Earl of Shelbourne, with covenant for perpetual renewal, and out of which the interest demised by the indenture now under statement was derived, and paying such renewal fines as were then due and to be paid to the Earl of Shelbourne by the said William Marcus Jackson, his heirs and assigns, pursuant to his covenants with the said Earl of Shelbourne, on his inserting and adding lives in the place and stead of such as had not yet been supplied, so as to enable the said William Marcus Jackson and William Devereux Jackson, their heirs and assigns, to grant to the said Nicholas Mahon, his heirs and assigns, the estate and interest so intended to be demised to him. And after reciting that a fine had been levied by William Marcus Jackson and William Devereux Jackson, unto the said Nicholas Mahon and his heirs, of part of the lands of Moylish, then in his possession, for the purpose of obviating all doubts as to the estates which William Marcus Jackson and Wm. Devereux Jackson might have taken in the said lands under the settlement of 22d June 1780, and for barring all estate tail under the settlement, it was declared that the fine should enure for the purposes of the demise thereby intended to be granted. And by the said indenture of lease the said Nicholas Mahon covenanted with the said William Marcus Jackson, his heirs and assigns, that he the said Nicholas Mahon would at all times thereafter advance and pay all such sum and sums of money as should be necessary to procure renewals from the said Earl of

Shelbourne, under the covenant for perpetual renewal contained in the said lease by which the said lands were held as aforesaid; it being the intent and meaning of the parties, that the said fines so thereafter to be paid to the said Earl of Shelbourne, his heirs and assigns, should at all times be paid by the said Nicholas Mahon, his heirs and assigns, and no part thereof by the said William Marcus Jackson and William Devereux Jackson, their heirs and assigns.

By an indenture dated the 12th April 1806, and made between the said William Marcus Jackson of the first part, the said William Devereux Jackson of the second part, the said William Holland and Edward Jones of the third part, and Henry Wilson and John Jackson, Esquires, of the fourth part, the said William Marcus Jackson did, by virtue of the said indenture of settlement of the 22d June 1780, appoint the town and lands of Clonlara, with their appurtenances, to the said William Devereux Jackson, and to the heirs male of his body, subject, however, to the life estate of the said William Marcus Jackson. And by the said indenture the said William Marcus Jackson and William Devereux Jackson did bar all entails of the said William Devereux Jackson in the lands of Clonlara.

By an indenture of lease dated the 12th April 1806, and made between the said William Marcus Jackson and William Devereux Jackson of the one part, and John Young, Esq., of the other part, for the considerations therein mentioned, William Marcus Jackson and William Devereux Jackson demised unto the said John Young part of the lands of Clonlara, containing 37 A. 2 R. 35 P., Irish plantation measure, as therein particularly described, for the lives of the three persons

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therein named, and for the term of thirty-one years from the decease of the survivor of them, at the yearly rent of *3*l.* 8*s.* 3*d.** per acre.

By another indenture of lease, also dated the 12th April 1806, and made between the said William Marcus Jackson and William Devereux Jackson of the one part, and Samuel Young, Gent., of the other part, for the considerations therein mentioned, William Marcus Jackson and William Devereux Jackson demised unto Samuel Young other part of the lands of Clonlara, containing 37 A. 2 R. 35 P., Irish plantation measure, as therein particularly described, for the lives of the three several persons therein named, and for the term of thirty-one years from the decease of the survivor of them, at the yearly rent of *3*l.* 8*s.* 3*d.** an acre.

By indentures of lease and release, dated the 10th and 11th December 1807, the release being made between the said William Devereux Jackson, Henry Wilson, and John Jackson, Esquires, of the one part, and the said William Marcus Jackson of the other part, after reciting the several deeds before mentioned, and that it being found convenient by the said William Marcus Jackson, and also by the said William Devereux Jackson, not only for the purpose of family settlements, but under certain agreements for leases of the said lands of Moylish and Clonlara, entered into and since concluded by the said William Marcus Jackson and William Devereux Jackson to certain of the tenants of the said lands, who for greater safety were advised that the entails in the said several lands should be barred by means of the aforesaid deeds, and also for the purpose of enabling the said William Marcus Jackson to pay off several debts and engagements incurred by the said Wil-

liam Devereux Jackson, and the said William Marcus Jackson, reposing the fullest confidence in his said son the said William Devereux Jackson, did, for the purposes aforesaid, convey in the manner as in the said several deeds was expressed the said lands, It was witnessed that the said William Devereux Jackson, in consideration of the said several debts by the said William Marcus Jackson for him paid, and of 5s., and in discharge of the trusts and confidence so as above reposed in him by the said William Devereux Jackson, did, in due form of law, convey and assure unto the said William Marcus Jackson, and to his heirs and assigns, all the said lands of Moylish and Clonlara, with the appurtenances, and all the right, title, and interest of him the said William Devereux Jackson therein or thereto.

In the year 1815 William Devereux Jackson died intestate, and without issue, whereupon the appellant became the eldest son of the said William Marcus Jackson.

The said lands of Clonlara were afterwards sold and disposed of by William Marcus Jackson.

William Marcus Jackson, by his will, dated the 20th October 1821, (duly attested by three witnesses,) gave, devised, and bequeathed all his estate and interest in and to the said lands of Moylish unto his said wife Jane Jackson, and to Edward Gloster, therein named, in trust that his wife should have and receive during her life an annuity of 50*l.* in addition to the jointure settled upon her by his marriage settlement, the said annuity to be paid to his wife out of that part of the said lands of Moylish tenanted by one Nicholas Mahon, on the 1st May and 1st November

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in every year during her life, in equal portions, the first half-yearly payment thereof to be made on such of the said days as should first happen after his decease; and upon further trust that his said trustees should, after payment of the said annuity, yearly receive out of the said lands of Moylish the sum of 100*l*. by two half-yearly payments, on the days aforesaid, and place the same out at interest, until the sum of 550*l*. should be made up, to be applied in the manner therein mentioned; and that when that sum should be made up the said testator declared that the said sum of 100*l*. should go to increase the jointure of his said wife, and should be paid to her at the same times as the said sum of 50*l*. a year was therein-before made payable. And as to the residue of the rents of the said lands of Moylish, after the said sums of 50*l*. and 100*l*., annually, in trust to pay the same to the appellant during the life of his (the said testator's) said wife; but on her death, and on the sum of 550*l*. being raised out of the rents of the said lands of Moylish as aforesaid, the said testator declared that the said Edward Gloster, his heirs and assigns, should stand seized of the said lands of Moylish to the use of testator's sons, the appellant, and the respondent Robert Jackson, during their natural lives respectively, to be held by them as tenants in common, and not as joint tenants, with remainder to the legitimate issue of the appellant, and the respondent Robert Jackson, in such manner and form, shares and proportions, as the appellant, and the respondent Robert Jackson, should by deed or will, duly executed, direct or appoint; and in failure of legitimate issue in either of his (the said testator's) said sons, he devised his share so dying without legitimate issue to the other

of them, his heirs and assigns, for ever. And as to the said sum of 550*l.*, when the same should be raised out of the rents of the said lands of Moylish, and as to a certain sum of 450*l.* which the said testator stated the said Edward Gloster owed him, he the said testator gave and bequeathed the said two sums, making together 1,000*l.*, to his grand-daughters, the respondents Elizabeth Maunsell and Maria Maunsell, daughters of William Maunsell, Esquire, share and share alike, the same to be paid to them at their respective ages of twenty-one years or days of marriage, whichever should first happen, provided such marriage should take place with the consent therein mentioned, the interest to be paid to his said wife, and applied as she should please towards their education and maintenance in the meantime. And the said testator expressly devised the said sum of 1,000*l.* to his said grand-daughters in payment and full discharge of any sum or sums of money claimed to be due by him the said testator to their father the said William Maunsell, either by bill, bond, note, book account, or in any manner; and the said testator declared that should the said William Maunsell not deliver up the said bonds, notes, and other securities cancelled, to his (the said testator's) executors, or should the said William Maunsell demand any of the said sums of money, or any part thereof, then he (the said testator) devised the said sum of 1,000*l.* to his residuary legatee. And as to all the rest, residue, and remainder of his real, freehold, and personal estate and property, of every kind and nature whatsoever, which he should die seised and possessed of or in any manner entitled to, and not therein-before disposed of, the testator gave, devised, and bequeathed such residue to his wife, her

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heirs, executors, administrators, and assigns, as his residuary legatee.

In November 1822 William Marcus Jackson died, leaving the appellant, and the respondent Robert Jackson, his only children, him surviving.

On the 21st January 1824 a bill was filed by Jane Jackson, the widow of the testator, against George Jackson (the appellant), for establishing the will of William Marcus Jackson.

The appellant appeared and put in his answer to the said bill, and issue having been joined therein, and the said cause having been set down for hearing, the said bill was, by the decree of the Court, dated the 21st June 1836, dismissed with costs, and which costs were ultimately paid to the appellant.

In 1833 Jane Jackson died.

On the 21st January 1836 the respondent Robert Jackson filed his bill in the Court of Chancery in Ireland, against the appellant, and the respondents Elizabeth Maunsell and Maria Maunsell, charging, amongst other things, that the deed of January 1804 was a fair execution of the power given to the said William Marcus Jackson by the deed of 1780, and that the deed of 11th December 1807 was unimpaired by any fraud, and was not executed in consideration of the previous appointment or any corrupt agreement; and praying that the will of William Marcus Jackson might be declared well proved, and that the same might be established, and the trusts thereof carried into execution by the decree of the said Court; and that the respondent Robert Jackson might be declared to be entitled to an estate in quasi tail in one moiety of the said lands of Moylish, under the construction of the said will, and

might be put into possession thereof accordingly; and that an account might be taken of the rents and profits received by the appellant out of the said lands since the death of the respondent Robert Jackson's mother, and that the said respondent Robert Jackson might be declared entitled to one moiety thereof, and that the appellant might be decreed to pay the same to the said respondent Robert Jackson, by a short day, to be named for that purpose; or if the said Court should be of opinion that the said deeds of the 14th January 1804 and the 11th December 1807 were void, then that the said will of the said William Marcus Jackson, deceased, of the 20th October 1821, might be deemed and taken to be a valid execution of the power of appointment contained in the said deed of the 22d June 1780, and that the respondent's rights might be decreed thereunder.

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The appellant by his answer insisted that the said deed of appointment of the 14th January 1804 was not made in bonâ fide execution of the said power of appointment given by the said marriage settlement of 1780, but that the same was made to enable the said William Marcus Jackson to derive benefit therefrom to himself, and also to enable him to have executed the several leases herein-before mentioned, on which he, William Marcus Jackson, also received fines, and that the said deed of appointment was fraudulent and void in equity for the reasons aforesaid, and that the said deed of 1807 was executed in consideration of a corrupt agreement between William Marcus Jackson and William Devereux Jackson, and insisted that in the event of the said deeds being declared void the said will of William Marcus Jackson, in the said bill mentioned, was

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not a good and valid execution of the power of appointment given him by the deed of 1780.

On the 1st May 1839 the cause came on to be heard before the Lord Chancellor of Ireland. On the 3d May 1838 his Lordship, by his decree, established the will of the testator William Marcus Jackson, and declared that the respondent Robert Jackson was entitled to an estate quasi in tail in one moiety of the lands of Moylish from the decease of Jane Jackson, and that the respondents Elizabeth Maunsell and Maria Maunsell were entitled to the legacies bequeathed by the will, if the amount of the rents of the lands of Moylish received by the appellant during the life of Jane Jackson was sufficient for that purpose.

From this decree the appellant George Jackson appealed.

Appellant's
Argument.

Mr. Pemberton and Mr. Wakefield for the Appellant.—

The consideration for the appointment by the father in favour of the son was fraudulent. The appointment was made in consideration of the father's debts, amounting to 1,600*l.*, being paid. It is not proved that the son received any benefit from this transaction; but if he had, the transaction would have been fraudulent. The will cannot be considered as a good execution of the power; certain sums are given to grand-children; annuities are given, and the appointment to the son is in tail, not in tail male. It has been said that a cross bill ought to have been filed, but the whole transaction has been put in issue upon the record, and no objection was taken in the Court below.

Mr. Knight Bruce and Mr. Eade for the Respondents.

—The deed of the 14th January 1804 is a good appointment, and there is no evidence to connect that deed with the subsequent deed of the 18th January 1804. The estate could not be sold without paying off the incumbrances on the estate. It has been assumed that the payment of these debts was for the benefit of the father, whereas it was for the benefit of the purchaser. It is too much to say, at the instance of the defendant, that the deed ought to be set aside thirty-six years after its execution, when all the parties to the transaction are dead. It appears by the deed of 1807 that the father had paid off the debts of the son; the father might buy the estate of the son. The levying of the fine was unnecessary; the estate was barred by a conveyance. If the son had filed a bill against the father to invalidate the appointment in reasonable time it might have been relieved against; but if the appointment is bad under the deed, the will executing the power is good; it is only void for the excess.

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Respondent's
Argument.

11th August 1840.

LORD CHANCELLOR.—This is a case from the Court of Chancery in Ireland, which, on examination of the pleadings, it appears has come before your Lordships under very peculiar circumstances. The suit is by a party claiming under the will of the father, a will in which the father has assumed the right of disposing of certain lands stated to be situated in a place called Moylish. The answer to this claim is, that that estate was not the estate of the father, at least not an estate over which the father had a right to exercise the power of disposition by will, it being stated that he derived his

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title under a settlement by which the father was tenant for life, with the power of appointing to his children in tail male.

The father, it appears, appointed in favour of his eldest son, and upon the face of that instrument there is nothing to impeach it. But other instruments are stated which certainly throw very great doubt upon the propriety of that transaction, because by another deed, of the 18th January 1804, the father and son joined together in granting a lease for three lives, renewable for ever, in consideration of 1,600*l.*, that 1,600*l.* being in the very terms of the deed to be applied in relieving the estate from certain debts of the father.

The deed of the 11th December 1807 increases those doubts; for it speaks of the conveyance to the son having been upon trust and confidence, and it is as a conveyance back to the father of the estate which had been so apparently appointed to the son. It also speaks of fines, by which the estate tail was barred; but as to those fines, under what circumstances or for what purpose they were levied is only to be inferred from what is stated in that deed.

Now the decree assumes that this estate was the absolute property of the father, and directs that one moiety of the estate shall be held by the respondent, assuming that the title under the father's will was good. It also directs that the defendant shall account for a moiety of the rents from the death of the father, although his title did not accrue till the death of the mother in 1833.

Now the only ground upon which that can be explained is, that the will directed a sum of 100*l.* a year to accumulate until 550*l.* should be realized, that sum

when realized to go to make up a sum of 1,000*l.* left to certain children of the testator. I presume, although it is very indistinctly stated upon the pleadings and in the decree, that the object of that part of the decree was to relieve the estate of the plaintiff from that burden of any portion of the 550*l.* Now if that was the object of the decree, it is not in the shape and form in which it ought to be to carry out that object; because if it was only for the purpose of relieving the estate of the plaintiff from that burden of 550*l.*, or any portion of it, the first inquiry would have been, what portion of that 550*l.* remained unpaid, and whether the income received by the defendant (always supposing the decree to be right upon the merits) between the interval of the death of the father and the death of the mother had or had not been sufficient for the purpose of meeting and providing for that charge; because if that charge had been provided for, and it had been ascertained that a sufficient amount of rent had been received for that purpose,—if, for instance, the rents had amounted to ten times that sum,—the mere fact of the defendant having received property equal to that sum would not have been a sufficient ground for the decree. That, however, I refer to only incidentally; because it does not appear to me a matter which can justify the shape which the decree has assumed.

But, on the merits of the case, I think the decree cannot be supported in its present form. The decree assumes that all these objections to the title of the father are of no avail. It decrees at once, upon the state of information then before the Court, that all these transactions and appointments were valid, and that the father had, by means of the appointment, and the title he got

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from the son in whose favour the appointment was made, a valid title, and therefore decrees in favour of the plaintiff claiming under the will.

Now, without expressing any final opinion (because I do not think the case is as yet ripe for it) as to the effect of all these transactions, it is quite obvious that there is ample ground for suspicion. In the first place, these two deeds coming together almost at the same moment, the appointment in favour of the son, and the deed by which 1,600*l.* was raised by fine upon that very estate, to be applied in satisfying the debts which were charged on the estate, which were the debts of the father, would of itself raise a strong suspicion that it was not an appointment by the father, honestly and fairly exercising the power which the settlement gave him, but that he was influenced in making the appointment by the benefit which he expected and contracted to receive for himself. But the deed of 1807 makes the case much stronger, because we there find the son restoring the estate to the father. It is true that that deed states the father to have paid various debts of the son; that may or may not be true. It may be, that the object of all this was to raise money to pay the son's debts; it may be that there was no intention to commit any fraud by this appointment. But whether the recital was true or not the Court has no means of judging, for there is no evidence in the cause; there is nothing before the Court to enable it to form any opinion as to the validity of these transactions but what appears upon the face of the instruments themselves.

Under these circumstances, we are left entirely in the dark whether any title was obtained independently

of this appointment, for it appears that the son was tenant in tail under the appointment. One argument was, that supposing the appointment were entirely out of the question, the father and the son together had, by means of the estate, independently of the appointment, the means of procuring an absolute dominion over the property. But under what circumstances all these transactions took place is without any proof, except so far as they are stated in those deeds to which I have referred. Therefore, under these circumstances, and with the facts appearing upon these deeds, I think it was too much for the Court to assume that the title of the father was good, and therefore that, as it respected the parties claiming under the will, it was property of which the father had an absolute power of disposing. I am equally of opinion that it is not a case in which it is competent to the Court to come to any determination in favour of the defendant, but that the defendant has merely thrown suspicion upon the title of the plaintiff, by that which appeared upon the deeds produced. It might be that the statement in the deed of 1807 would be established; namely, that the whole object of this was to pay the debts of the son; whether it was or not does not appear; but this ought not to be left to conjecture, but the facts ought to be ascertained before the Court proceeds to act upon the deed. I apprehend the duty of a court of equity to be, when it finds itself in a situation not to be able either to decide in favour of the plaintiff or in favour of the defendant, and so to adjudicate as to the title, to enter into a course of investigation, by which the real facts of the case may be ascertained, before it comes to any final adjudication upon the merits. What I propose,

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therefore, to your Lordships is, to reverse this decree, and to declare that before any adjudication upon the plaintiff's title under the will, there should be an inquiry before the Master what title the testator had at the time of his death in the lands of Moylish, and how the same was derived, and particularly whether the appointment of those lands in favour of the son William Devereux Jackson was a good and valid appointment, with liberty to state special circumstances; and in order to avoid the expense and delay of another reference at a future stage of the cause, I would propose that there should be an inquiry whether the 550*l.*, or any and what part thereof, is or was due at the time of the death of the testator, and what is now due in respect thereof; and whether the rents received by George Jackson during the lifetime of Jane the widow were sufficient to pay the same. These inquiries, it is true, would not arise until the question of title had been decided, but I think it would be expedient, in order to save time, that the Master should at the same time pursue that inquiry.

Decree reversed, and cause remitted to the
Court of Chancery in Ireland.

[*7th, 10th, and 13th April 1840, and 27th April 1841.*]

(From the Court of Chancery, Ireland.)

JOSEPH HENRY M'CAN, Appellant.

CATHERINE O'FERRALL by GERALD O'FERRALL her next Friend, GERALD O'FERRALL, ARTHUR O'FERRALL, and JOHN O'FERRALL junior, SARAH O'FERRALL, and JOHN O'FERRALL, Respondents.

CATHERINE O'FERRALL by GERALD O'FERRALL her eldest Son and next Friend, GERALD O'FERRALL, ARTHUR O'FERRALL, and JOHN O'FERRALL the younger, Appellants.

JOSEPH HENRY M'CAN, JOHN O'FERRALL, JOHN DODD, and SARAH O'FERRALL, Respondents.

On Appeal and Cross-appeal.

A. Forbes, having equally divided his property amongst his wife and children, directed that 400*l.* a year should be paid to his wife, for the maintenance of herself and children, during her widowhood, but upon her second marriage 60*l.* a year, and that his children should be maintained out of his estate. The widow having married Ross M'Can concealed her marriage, and received the

400*l*. a year, and having been appointed receiver in 1792 passed an account before the Master under the name of Margaret Forbes, wherein the 400*l*. per annum was allowed. Margaret Forbes died; and Ross M'Can, as administrator of her and A. Forbes, passed an account in 1795 before the Master, and, being appointed guardian of the children and receiver of the property of the testator, agreed with the children, who had all attained twenty-one, to refer the accounts of their father's estate to arbitration. During the pendency of the arbitration, Catherine, one of the daughters of the testator, by articles in contemplation of a marriage which afterwards took place between herself and John O'Ferrall, agreed that 1,000*l*. of her fortune should be paid to John O'Ferrall, and that the interest of the residue should be paid to them during their lives, and after the death of the survivor amongst their children, as they should appoint, and in default equally amongst the children. The award was afterwards made, Catherine Forbes, under her maiden name, having consented to enlarge the time; and several accounts were passed before the Master by Ross M'Can, as receiver of the testator's estate, and the proceedings carried on under the name of Catherine Forbes.—Held, that the accounts which were passed in 1792 and 1795 were fraudulent, to the extent of the difference between the 400*l*. and 60*l*., although an allowance ought to be made for the maintenance of the children out of the estate of the testator; that the award and accounts passed by Ross M'Can were invalid against Catherine O'Ferrall and her children, Ross M'Can having a knowledge of the marriage of Catherine Forbes at the time the award was made and the accounts passed; and that Ross M'Can, as receiver and representative of A. Forbes and Margaret his widow, having paid to John O'Ferrall various sums in respect of which he ought to have accounted to the Court, was primarily liable, yet that the representative of John O'Ferrall ought to be kept before the Court in case of a deficiency of assets of Ross M'Can to satisfy the demands under the articles.

THE Reverend Arthur Forbes, of Drumconragh in the county Meath, by will dated 17th of July 1783, after giving certain legacies to his four children, gave to his wife Margaret Forbes and her children the sum of four hundred pounds yearly for her and her children's maintenance and education whilst she continued unmarried; but in case she married again in lieu thereof 60*l*. a year; and directed his executors to pay such sum as his nephew and other relations should think necessary for the education and maintenance of his children; and after making certain specific bequests bequeathed the residue of his substance to be equally divided between his wife and children, and appointed his wife Margaret, and his niece Priscilla, executrixes of his will.

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On the 24th of July 1783 Arthur Forbes died, leaving Margaret Forbes his widow, Arthur Forbes, Catherine Forbes, Priscilla Forbes, and John Forbes, who died an infant prior to the year 1790, his only children.

On the 24th February 1790, after a protracted litigation, Margaret Forbes obtained probate of the will.

On the 13th March 1790, on the petition of Margaret Forbes, Charles Walker, one of the masters of the Court, was appointed guardian of the estate of the children, and on the 17th July in the same year Margaret Forbes was appointed guardian of the persons of the children of the testator, and Thomas Walker, one of the masters of the Court, was appointed guardian of their estates, in the place of Charles Walker, deceased.

On the 7th June 1791, on the petition of Thomas Walker, Margaret Forbes was appointed receiver of

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the estates of her children. In the month of June 1791 Margaret Forbes intermarried with Ross M'Can, and on the 26th June 1792 passed her account as receiver under the name of Margaret Forbes, concealing the fact of her second marriage. On the 7th November 1794 Margaret M'Can died intestate, and in February 1795 Ross M'Can obtained letters of administration to the estate of his wife, and to the goods of A. Forbes, unadministered, during the minority of his children.

On the 4th December 1795 Ross M'Can, as administrator of Margaret Forbes and of Arthur Forbes, passed an account of the estate of the minors from the death of their father, without alluding to the account passed by Margaret Forbes.

In the two accounts passed in 1792 and 1795 credit was given for the 400*l.* a year paid to Margaret Forbes up to the time of her death.

By orders of the 8th of January and 31st March 1796 Ross M'Can was appointed receiver of the estates, and guardian of the persons of the minors, upon entering into the usual security to account.

On the 25th March 1796 the Court of Chancery ordered that 80*l.* a year should be allowed to Ross M'Can for the maintenance and education of each of the minors, to commence from the 17th July 1795.

On the 17th January 1798 Catherine Forbes, and, prior to 1802, Arthur Forbes and Priscilla Forbes, attained the age of twenty-one.

On the 4th March 1802 a deed of submission was signed and sealed by them and Ross M'Can, whereby all matters in difference between them and Ross M'Can were referred to Arthur Browne, the prime serjeant, and

Gerald O'Ferrall, and which was made a rule of court the 12th May 1802.

By marriage articles, dated the 22d day of May 1802, in contemplation of a marriage which was had on the day of the date of the articles, and made and executed by and between John O'Ferrall of the first part, Catherine Forbes of the second part, and Gerald O'Ferrall, one of the arbitrators, of the third part, whereby, after reciting that Catherine Forbes had then in the hands of Ross M'Can 5,000*l.* or thereabouts, it was agreed, after the marriage, that it should be lawful for Gerald O'Ferrall to call in and receive from Ross M'Can all such sums of money and securities for money as Catherine Forbes was then entitled to, upon trust to pay to John O'Ferrall the sum of 1,000*l.* for his advancement in his profession, and to place the remainder at interest in such manner as John O'Ferrall and Catherine Forbes (notwithstanding her coverture) should direct, and that the interest thereof should be paid to John O'Ferrall during their joint lives and the life of the survivor of them, and after the decease of the survivor in such shares and proportions as he or she, by deed or will, should think fit, amongst the issue of the marriage, and in default of appointment amongst the children equally, and if but one child to such one child.

On the 25th June 1802, the time for making the award having then expired, an order was made by the Court of Chancery, expressed to be upon the consent of Catherine Forbes, under her maiden name, for enlarging the time for making the award until the 26th of June 1802.

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On the 26th of June 1802 the arbitrators made their award, whereby they awarded that Ross M'Can should pay to Catherine O'Ferrall, Arthur Forbes, and Priscilla Forbes, the sums therein mentioned.

Ross M'Can's account of Catherine Forbes's fortune, upon which the award was founded, was made up to the 7th January 1802.

In December 1803 Matthew O'Connor intermarried with Priscilla Forbes.

On the 6th September 1802 an order was made that Ross M'Can should account for the fortunes of the minors.

On the 9th November 1802 Catherine O'Ferrall, in the name of Catherine Forbes, together with Arthur Forbes and Priscilla Forbes, signed and gave a power of attorney to Ross M'Can, enabling him to receive out of Court certain securities which had been lodged by him in the Bank of Ireland, and, on a petition presented by him for that purpose, and supported by his affidavit, by an order of the 4th October 1803 it was ordered, that Ross M'Can should account before the master, as administrator of Arthur Forbes and Margaret Forbes, and as guardian and receiver of the fortunes of the late minors respectively, and the master was ordered to inquire when they respectively attained twenty-one, and what was due to them respectively, and why Ross M'Can had not duly accounted before; but neither of the orders to make him account were ever prosecuted.

In 1806, 1810, and 1814 Ross M'Can passed accounts before the master as receiver, and the proceedings were carried on under the name of Catherine Forbes.

The account of 1806 was adopted, as it appears by the report, and affidavit of Ross M'Can, upon the alleged consent and approval of Catherine Forbes and the other children, and the account of 1810, as appears by an affidavit of Ross M'Can, upon the consent of John O'Ferrall, Matthew O'Connor, and Arthur Forbes. The account of 1814 was passed, and Ross M'Can's recognizance was vacated, upon an undertaking from him in a letter to John O'Ferrall that the account then taken should not be binding.

Between the 18th September 1802 and the 8th November 1806, by an account sent by Ross M'Can to John O'Ferrall, and which was admitted by John O'Ferrall to be correct, Ross M'Can paid to John O'Ferrall himself, and to Catherine his wife, for her use, the sum of 8,004*l.* 16*s.* 6½*d.*, on account of her fortune. Amongst the items in this account was a payment to John O'Ferrall of 1,000*l.*, ordered by the Court of Chancery on the 19th July 1806 to be paid to Catherine O'Ferrall, upon a petition presented by her under the name of Catherine Forbes, and supported by an affidavit of Ross M'Can; and for this payment Catherine O'Ferrall had signed to the receipt the name of Catherine Forbes.

In 1819 John O'Ferrall and Catherine his wife filed their bill of complaint against Ross M'Can, for an account of the assets of the testator Arthur Forbes; and Arthur Forbes, his son, having died pending the suit, the suit was revived against Ross M'Can, as administrator of Arthur Forbes the son; and Ross M'Can having also died in February 1828, the same was again revived against Joseph Henry M'Can, as

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the personal representative of Ross M'Can, and was dismissed in 1832, upon Joseph Henry M'Can undertaking within a month to give security in a sum of 8,000*£* to abide any decree to be made on a bill to be filed in relation to the assets of the testator Arthur Forbes, on behalf of Catherine O'Ferrall and her children.

Ross M'Can, in his answer to the bill, denied that he had any knowledge of the marriage of John O'Ferrall with Catherine O'Ferrall until September 1802, or that he knew of the existence of the articles of settlement until 1811 ; but Priscilla O'Connor proved his knowledge of the marriage, as he informed her of it two days before it took place, and on the 17th June 1802 Ross M'Can wrote to John O'Ferrall, desiring John O'Ferrall to bring with him Mrs. O'Ferrall's private book.

On the 25th May 1832 Catherine O'Ferrall and her children filed their bill against Joseph Henry M'Can, John O'Ferrall, Matthew O'Connor, and Priscilla O'Connor his wife, who had obtained letters of administration to the testator Arthur Forbes, and Edward O'Ferrall, the executor of Gerald O'Ferrall, and Edward O'Ferrall having died the suit was duly revived against Sarah O'Ferrall, administratrix of Edward O'Ferrall, and administratrix de bonis non of Gerald O'Ferrall, alleging that the accounts of 1792, 1795, and 1814 were in several particulars therein mentioned fraudulent and erroneous, that the award was founded upon fraudulent accounts produced by Ross M'Can, and that it was void and fraudulent, and that the submission was revoked by the marriage of Catherine

Forbes; and praying that the accounts passed in 1792, 1795, 1814, and the award of 1802 might be declared fraudulent and void, and that the usual accounts of the personal estate of Arthur Forbes might be taken; that interest might be charged, with half-yearly rests, on the balances in the hands of Margaret and Ross M'Can respectively; and that the trusts of the will might be carried into execution; and that an account might be taken of what was due on the foot thereof to Catherine O'Ferrall and the other children of the testator, and that Ross M'Can might not have credit for any sums paid to John O'Ferrall beyond 1,000*l*.; that the articles of the 22d May 1802 might be reformed, so as to include the whole fortune of Catherine O'Ferrall, except 1,000*l*. therein mentioned, and that an annual sum, independent of John O'Ferrall, might be settled upon her during the life of John O'Ferrall; and that the interest of John O'Ferrall in certain freehold lands which he possessed in right of his wife might be sequestered, to make good to Catherine O'Ferrall the losses occasioned by his conduct; and that in case the assets of Ross M'Can should not be found sufficient for that purpose, that then John O'Ferrall might be decreed to pay into Court such portion of the fortune of his wife Catherine O'Ferrall as he might have received, over and above the annual interest thereof, and that an account might be taken for that purpose; and if the assets of Ross M'Can should be found insufficient to make good the sum found due to the appellants, that the personal representatives of the said Gerald O'Ferrall might be decreed chargeable therewith, to such amount as the Court might direct.

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The defendants to the bill having put in their answers, and the cause being at issue, the cause came on to be heard before the Lord Chancellor of Ireland on the 14th and five following days of January 1834, and on the 6th of March following his Lordship decreed that the portion of Catherine O'Ferrall, as found by the award, ought to be increased by the sum therein mentioned, and after deducting therefrom 1,000*l.*, to which John O'Ferrall was entitled under the marriage articles, it was ordered that the same should be laid out by Joseph Henry M'Can, within one month from the date thereof, in the purchase of government three and a half per cent. stock, to be transferred to the credit of the cause, and John O'Ferrall was declared entitled to have the interest of the portion of Catherine O'Ferrall, from the day of his marriage with her; and in taking the account John O'Ferrall was to be charged with all sums paid by Ross M'Can to Catherine O'Ferrall from the 7th January 1802 to the day of her marriage, and with all sums paid to John O'Ferrall after the marriage; and Ross M'Can was to be debited with half-yearly interest on her portion, except on the 1,000*l.* from the time it was paid off; and if upon taking the account any balance should appear due to Joseph Henry M'Can, John O'Ferrall should pay the same to Joseph Henry M'Can. And it was ordered, that a receiver should be appointed over Catherine O'Ferrall's moiety of the lands at Rowskly and Bruslanstown, and that such receiver should bring in, and from time to time invest in like government three and a half per cent. stock, the balance which should from time to time be in his hands, to be transferred to the credit of the

cause; and in case John O'Ferrall should not pay the aforesaid balance to Joseph Henry M'Can, with the costs in the decree mentioned, Joseph Henry M'Can should have his remedy for the same against the life estate of John O'Ferrall in the interest and dividends on the said principal sums therein mentioned, and against the rents and profits of the said lands and premises, so far as John O'Ferrall was interested therein as the husband of Catherine O'Ferrall, and against the fund arising out of the rents. And, subject thereto, it was declared that Catherine O'Ferrall, John O'Ferrall having consented thereto, was entitled to the dividends of the principal sum and the rents of the said lands for her life, to her sole and separate use, so as she should not anticipate or incumber the same, and that her children were entitled to the principal sum according to the trusts of the marriage articles. And it was ordered that the defendant Sarah O'Ferrall, representative of Gerald O'Ferrall, deceased, should abide her own costs, and that the consideration of the liability of Gerald O'Ferrall should be reserved, in case Catherine O'Ferrall and her children should be unable to recover the same from Joseph Henry M'Can, or in case he should make default. And it was ordered, that the bill be dismissed against Sarah O'Ferrall, without costs. And it was ordered, that Joseph Henry M'Can, within one fortnight, according to the terms of the decretal order of 20th January 1832, in the cause of O'Ferrall and wife against M'Can and others, should give security in a sum of 8,000*l.* to abide the decree; and in case Joseph Henry M'Can should not, within one month from the date of the decree, transfer to the credit of the cause the sum before directed, it was

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ordered that the appellants should be at liberty forthwith to proceed at law as they might be advised, upon the recognizance entered into by Ross M'Can, Sir Marcus Somerville, and David Hanly, and upon such other recognizance as might be entered into by Ross M'Can and his sureties; and that the amount thereof, when levied, should be invested in like government three and a half per cent. stock, and transferred to the credit of the cause; and that the several recognizances should stand as securities to plaintiffs for their costs, in that and the cross cause, until paid. And it was ordered, that the defendants Matthew O'Connor and Priscilla his wife should have their costs in the cause from the appellants, and that the appellants should have the same along with their own costs in the said cause against John O'Ferrall and Joseph Henry M'Can, and that the respondent John O'Ferrall should pay Joseph Henry M'Can his costs in the cause, and also the appellants costs, in case the appellants should enforce the same against the respondent Joseph Henry M'Can.

On the 16th of June 1832 Joseph Henry M'Can filed a cross bill against the parties to the original cause, charging that John O'Ferrall and Catherine his wife, and Gerald O'Ferrall, deceased, had been guilty of frauds in concealing from the Court of Chancery and Ross M'Can the marriage articles made upon the marriage of John O'Ferrall with Catherine his wife, and that she had represented herself to the Court of Chancery as an unmarried woman, and thereby induced the Court to pay her 1,000*l.* of her fortune, and that the same had been done without the knowledge of Ross M'Can, and praying that the award might be established, and that an account might be taken on

the footing of the award of the assets of Arthur Forbes, and if Catherine O'Ferrall or John O'Ferrall, or Matthew O'Connor or Priscilla O'Connor, had received more of the assets than they were entitled to, then that such party might pay to Joseph Henry M'Can such surplus, and that he might have credit against Catherine O'Ferrall and her children for all sums paid by Ross M'Can to John O'Ferrall and Catherine O'Ferrall, on account of her fortune, subsequent to their marriage, and if it should appear to the Court that Joseph Henry M'Can or Ross M'Can was bound by the marriage articles, that then Edward O'Ferrall, as executor of Gerald O'Ferrall, might be decreed a trustee for Catherine O'Ferrall and her sons, and that Joseph Henry M'Can might have credit for all payments made by Gerald O'Ferrall's direction or consent, and if it should appear that Ross M'Can had paid to Catherine O'Ferrall or her husband the full amount of the sum awarded her, that Joseph Henry M'Can might be decreed not further responsible to Catherine O'Ferrall or her trustee, or any person claiming under the articles.

Edward O'Ferrall having died, the suit was revived against Sarah O'Ferrall, his personal representative; and the defendants having put in their answers to the cross bill, the cross cause came on to be heard at the same time as the original cause, and was, by the decree of the 6th March 1834, dismissed with costs.

On the 16th of June 1834 the respondent Joseph Henry M'Can presented a petition, praying that the said cause might be reheard.

On a rehearing of the original and cross causes, on the 10th July 1834, the decree was varied by enlarging

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the time for payment and transfer of the sum of 3,822*l.* 1*s.* 7½*d.* until the 24th of July, and by directing the payment and transfer by Joseph Henry M'Can of 1,000*l.*, as a fund for the plaintiffs costs.

In the month of May 1835 John O'Ferrall, the husband of Catherine O'Ferrall, having taken the benefit of the insolvent act, John Dodd, as his assignee, was, by supplemental bill, made a party to the suit.

On the 19th November 1835 the Lord Chancellor, on a re-hearing, varied the decree of the 6th of March 1834, by directing that in case the payments made by Ross M'Can to John O'Ferrall should exceed what was due for interest on the sums secured by the articles of the 22d May 1802, then that such excess should be taken as paid in discharge of the principal, and deducted therefrom, and that interest should thenceforth be calculated on the balance which should be then remaining due only, and if the payment so made by Ross M'Can should have amounted to the whole of such sums so secured, that from thenceforth the interest of the said principal sum of 4,000*l.*, secured by the articles, should cease during the lifetime of John O'Ferrall.

From the decrees of the 6th of March 1834 and 10th of July 1835 Joseph Henry M'Can appealed; and from the decrees of the 6th March 1834, 10th July 1834, and the 19th November 1835, Catherine O'Ferrall, Gerald O'Ferrall, Arthur O'Ferrall, and John O'Ferrall the younger, appealed.

Appellant's
Argument.

Mr. Pemberton and Mr. Kindersley for the Appellant, Joseph Henry M'Can. — Mr. Gerald O'Ferrall being a trustee, was guilty of fraud, in permitting John

O'Ferrall to receive his wife's fortune; he never gave notice of the marriage settlement to Ross M'Can, which bears date the day of the marriage, and might have been executed many years after the marriage; the witness who proves the execution of the settlement is not asked when it was executed. John O'Ferrall received from Ross M'Can upwards of 8,000*l.* on account of his wife's fortune; having no notice of the settlement, the payments made to John O'Ferrall on account of his wife were good payments, and Mrs. Catherine O'Ferrall having joined in the fraud has no right to relief. By an order of the 19th July 1806, Catherine O'Ferrall, upon her own petition and receipt, obtained 1,000*l.* of her fortune, and is this to be accounted for and paid to the trustees of the marriage settlement? Coverture is no excuse for fraud on the part of a married woman or infant, *Cory v. Gertcken*¹, *Evans v. Bicknell*², *Savage v. Foster*³; but even if she has a right to relief, Gerald O'Ferrall, who concealed the settlement, is primarily liable to make good the deficiency. The statute of limitations would prevent accounts of so long standing being opened after a period of more than thirty years from the date of the award, and sixty years after the death of the testator; it would be impossible, under such circumstances, to give a general account of his assets.

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Appellant's
Argument.

Mr. Wakefield and Mr. Hallett for the Respondents, Catherine O'Ferrall and her children. — Ross M'Can took credit for the 400*l.* a year which was forfeited

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¹ 2 *Mad.* 40.

² 6 *Ves.* 174.

³ 9 *Mod.* 35.

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upon the marriage of Catherine Forbes. Ross M'Can is proved to have known of the marriage of Catherine O'Ferrall before it took place, and he must be presumed to have had notice of the marriage articles before the award; and supposing he had not notice, it was his duty, as her guardian and receiver of her fortune, to have acquainted the Court of Chancery with her marriage, that a proper settlement might be made, under the sanction of the Court. Catherine O'Ferrall must be presumed to have acted under the control of her husband, over whom Ross M'Can had great influence. Ross M'Can was continually committing a fraud upon the Court; the accounts were all passed under the maiden name of Catherine Forbes. The award, therefore, and accounts, are all fraudulent and void. The statute of limitations is no bar to fraud. Ross M'Can was not only a mere executor or trustee, but he was the receiver appointed by the Court over the fortunes of the minors, and the Court will not sanction a fraud in one of its own officers.

Mr. Tinney and Mr. James Russell for Sarah O'Ferrall.

—M'Can admits he knew of the articles in 1811, and he still continues making payments to John O'Ferrall to 1816. The statute of limitations applies more strongly in favour of Gerald O'Ferrall than Ross M'Can. Ross M'Can is a receiver, and has never been discharged, and must be primarily liable before Gerald O'Ferrall can be charged. Gerald O'Ferrall never received any part of Catherine O'Ferrall's fortune, nor is there any proof that he was privy to the frauds practised by Ross M'Can and John O'Ferrall.

Mr. Pemberton in reply.—The award has been made a rule of Court, and the parties are bound by it; the award is not bad in consequence of the marriage, because all the parties interested had concurred in it. The parents having consented after marriage, the children are bound. Gerald O'Ferrall was a party to the marriage articles, and ought to have given notice to M'Can of the marriage articles; he never gives notice, and acts quite inconsistently with his duty as a trustee. M'Can can only be called upon in the second degree; he can only be answerable through the medium of the trustee; it is owing to the default of the trustee that the whole mischief has happened.

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LORD CHANCELLOR.—This case affords a melancholy instance of the extent to which frauds may be practised within the precincts of a court of equity. When such cases occur the Court must feel an anxious wish to afford all such relief as may be consistent with its principles and practice, and, as far as possible, to prevent its proceedings from being instrumental in protecting the author of such frauds. This is not only due to the parties injured, but to the public, who have an interest in the result, which may deter others from attempting similar practices.

Ld. Chancellor's
Speech.
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The papers in the cause are very voluminous, and the argument, both at the bar and in the Court below, took a very extensive range; but it will not be necessary for me to occupy much time in stating the grounds upon which I have formed the opinion, that the plaintiffs, the appellants, are entitled to a much more

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extensive relief than the decree appealed from has given.

The appellant Catherine O'Ferrall is one of the children of the Reverend Arthur Forbes, who died in 1783, having by his will given the residue of his property equally between his wife and children, having thereby directed that during his wife's widowhood 400*l*. per annum should be paid to her for herself and the maintenance and education of his children, but that upon her second marriage she should receive 60*l*. per annum only; and in that case he directed that the maintenance and education of his children should be paid out of his estate, under the direction of his nephews and certain other relations.

Margaret, the widow, after a contest, obtained probate of this will in 1790, and in 1791 married Ross M'Can, of whose estate the respondent Joseph Henry M'Can is now the representative, and died on the 17th November 1794, whereupon Ross M'Can obtained administration of her estate, and of the estate of the testator Arthur Forbes, during the minority of the children, which terminated on the 17th of January 1798, by the appellant Catherine then attaining twenty-one, and upon Arthur, another of the children, attaining twenty-one in August 1801, administration was granted to him; but Ross M'Can had, by an order of the Court of Chancery in Ireland of the 8th of January 1796, been appointed receiver of the fortune of the children, entering into security to account for such part of the fortunes of the minors as he should from time to time receive, as is usual in such cases.

On the 22d of May 1802 Catherine married John O'Ferrall, and by articles, executed in contemplation of the marriage, it was provided that Gerald O'Ferrall, a trustee, should get in the fortune of Catherine, then in the hands of Ross M'Can, and otherwise, and pay 1,000*l.* to John O'Ferrall the husband, and invest the residue, and pay the income to the husband, for the joint lives of the husband and wife and the survivor, and after the death of the survivor divide the same among the children, as the husband and wife, or the survivor, should appoint, and in default of appointment, equally. It does not appear that any suit had been instituted during this period, but in 1791 the widow, and in 1796 Ross M'Can, were appointed receivers of the fortunes of the infants, under the direction of the Master, which appears to be according to the practice of the Court of Chancery in Ireland, and in 1796, on the 25th of May, an allowance of 80*l.* per annum was ordered for the maintenance of the children, the widow being then dead; but it appears that from the time of the marriage between her and Ross M'Can the 400*l.* was paid to her or her husband, although by the will she was entitled only to 60*l.*, which was effected by concealing from the Court the fact of such marriage. Although, therefore, it appears that in 1792 the widow, and in December 1795 Ross M'Can, passed accounts before the Master, to which no irregularity in point of form has been imputed, it is certain that such accounts were erroneous and fraudulent to the extent of the difference between the 400*l.* and 60*l.* per annum, unless some allowance might have been claimed for the maintenance of the children from the date of the mother's marriage, she having been appointed guardian of their persons.

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It does not appear that any other account was taken, or that any thing else took place affecting the interest of the children, or the liability of the accounting parties, till after the marriage of Catherine in 1802. There had, indeed, been a reference to arbitration, and an order for that purpose, but the time for making the award had expired, and no consent had been given to enlarge the time when the marriage took place.

Ross M'Can by his answer denied knowledge of this marriage until September 1802, and of the articles of the marriage until 1811. This knowledge of the marriage at the time it took place is, however, established by the evidence of Priscilla O'Connor, who says that she was informed of the intended marriage a couple of days before it took place by Ross M'Can, and by a letter from him to John O'Ferrall, dated the 17th of June 1802, in which he desires John O'Ferrall to bring with him Mrs. O'Ferrall's private book. Of his knowledge of the articles prior to 1811 there is not, I believe, any direct proof, but when it is considered that he was the husband of the mother of Catherine O'Ferrall, and that Gerald O'Ferrall was the trustee of the settlement, and that these parties combined with John O'Ferrall the husband to conceal the fact of this marriage also from the Court, there can scarcely be any moral doubt of his knowledge of the settlement. To have made known the existence of the settlement, or even the fact of the marriage, would have been destructive of the scheme which he appears to have formed of settling his accounts with John O'Ferrall, and that through the instrumentality of Gerald O'Ferrall, whom these parties had appointed as arbitrator, together with

Mr. Serjeant Browne, to settle all matters in difference between the children and Ross M'Can.

On the 25th of June 1802 an order was made, expressed to be upon upon the consent of Catherine Forbes, but who was then Mrs. O'Ferrall, and to which Ross M'Can was also a party, enlarging the time for making the award until the 26th of June instant, and on that day the arbitrators made an award, directing Ross M'Can to pay to Catherine Forbes 4,872*l.* 13*s.* 4*d.*

At this time Catherine was a married woman, and the capital of her fortune was the property of her children. The submission, therefore, and the award, were inoperative, and so they seem to have been treated by the parties, for on the 6th of September 1802 an order was made for Ross M'Can accounting before the Master, and on the 4th of October 1803 an order was made that Ross M'Can should account before the Master as administrator of the original testator and of Margaret Forbes, and as guardian of the persons and receiver of the fortunes of the late minors respectively, and to inquire when they respectively attained twenty-one, and what was due to them respectively, and why M'Can had not duly accounted before. This reference was never prosecuted, and no report was ever made, and nothing which afterwards took place in the cause can have the effect of protecting Ross M'Can from accounting for the share of Catherine; although he appears to have passed an account before the Master in 1806, and in 1810, and 1814, as receiver, yet the proceedings were carried on in the name of Catherine Forbes, her settlement being concealed, although Ross M'Can admitted that he knew of the settlement in 1811. The accounts

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of 1806 were not in fact taken by the Master at all, but as appears by the report itself, and by an affidavit of Ross M'Can of the 30th of April 1806, were adopted upon the alleged consent and approval of Catherine Forbes and the other children, the respondent M'Can well knowing that Mrs. O'Ferrall was a married woman, and incapable of consenting, and the whole of her property being at the time in trust for her children; and the accounts of 1810 appear, by an affidavit of Ross M'Can of the 9th of June 1810, to have been adopted by the Master upon the consent of John O'Ferrall. The accounts in 1814 were passed, and Ross M'Can's recognizance vacated, under an arrangement that they should not be binding, as appears from a letter from him to John O'Ferrall, dated the 15th of February 1815, in which he uses the following words:—"By your consenting to have my recognizance vacated under the accounts which I passed before the Master in July last I do not mean to bind you or Mrs. O'Ferrall by that account; on the contrary, you and I will settle our accounts relative to the late Reverend Arthur Forbes's property as if no such account had been passed." These accounts cannot raise any impediment to the claims of the children of Catherine Forbes, and nothing more appears to have taken place till 1819, when a bill was filed by John O'Ferrall and his wife, which, having abated by the death of Ross M'Can, was revived against the present respondent Joseph Henry M'Can, and was dismissed in 1832, the defendant undertaking to give security for 8,000*l.* to abide any decree to be made on a bill to be filed in relation to the assets of the testator Arthur Forbes, on behalf of Catherine O'Ferrall and her children, or any of them.

The bill upon which the decree in question was made was accordingly filed by Catherine O'Ferrall and her children. This decree seems to assume, for certain purposes, the validity of the award, for it makes the sum thereby to be awarded the foundation of the claim which it enforces against M'Can's estate, adding, however, certain sums to it, which it appeared to the Court had been improperly withheld from the notice of the arbitrators, or which at least had not been included in their award.

I do not very well understand this mode of dealing with the award, supposing it to be valid, or dealing with it at all, if invalid and inoperative; and, being of opinion that it is invalid and inoperative as against the plaintiffs, I think the decree must be altered in this respect, and the account directed without reference to the award at all. But, as I do not find any ground for impeaching the regularity of the accounts passed in 1792 and 1795, the accounts to be taken must be upon the footing of the accounts so passed; but as it is proved that there are material errors and omissions in those accounts, the Master must look into, and, if necessary, correct such accounts, and such accounts must be in particular corrected by taking therefrom the 400*l.* per annum from the time of the marriage of Margaret Forbes, and by substituting in the place of it 60*l.* per annum, to which she was entitled after such marriage, to which there must be added an inquiry of who maintained the children from the marriage of the mother in June 1791 until the 25th of May 1796, when 80*l.* per annum was allowed for the maintenance of the children, and if Ross M'Can or the mother maintained them, what ought to be allowed for such

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in such a manner as to prevent the necessity of any further reference to the Court below.

It is ordered, That the original appeal be dismissed: And it is further ordered, That the appellant in the original appeal pay the costs of the respondents Catherine O'Ferrall, Gerald O'Ferrall, Arthur O'Ferrall, since deceased, and John O'Ferrall the younger, and of the respondent Sarah O'Ferrall, administratrix of Gerald O'Ferrall the elder, incurred by them in respect of the original appeal, to the said respondents Catherine O'Ferrall, Gerald O'Ferrall, and John O'Ferrall the younger, and to the said respondent Sarah O'Ferrall, administratrix of Gerald O'Ferrall the elder; the amount of such costs to be certified by the clerk assistant: And it is further ordered, That the decrees of the 6th March and 10th July 1834, the two orders of the 2d July and 31st October 1835, and the decree of the 19th of November 1835, complained of in the cross-appeal, be reversed: And it is declared, That the plaintiffs in the cause of O'Ferrall v. M'Can in the Court of Chancery in Ireland are entitled to a decree for an account of the personal estate of Arthur Forbes, and of the receipts and payments in respect thereof of Margaret Forbes and of Ross M'Can, as personal representatives of Arthur Forbes, and as guardians and receivers of the fortunes of his children, and otherwise howsoever, without regard to the award of the 26th of June 1802, or any account taken subsequently to the marriage of Catherine O'Ferrall with the defendant John O'Ferrall, and also of the receipts and payments of the defendant Joseph Henry M'Can in respect of such estate; and that such accounts ought accordingly to be taken against Joseph Henry M'Can, and the estate of Margaret Forbes and Ross M'Can, and that it ought by such decree to be declared, that in taking such accounts Margaret Forbes is to be considered as entitled under the will of the testator Arthur Forbes to the annual sum of 400*l.* only up to the time of her marriage with Ross M'Can, and to the annual sum of 60*l.* only from that time; and that inquiries ought by such decree to be directed as to

by whom the plaintiff Catherine O'Ferrall and the other children of the said testator were maintained from the time of the marriage of Margaret O'Ferrall up to the 17th of July 1795, when the allowance of 80*l.* per annum commenced, under the order of the 25th of March 1796; and if it should appear that they were maintained during the time by Margaret O'Ferrall or Ross M'Can, that then the Master ought to be directed to inquire what ought to be allowed for such maintenance during that time; and that the Master ought to be directed to inquire what balances were from time to time in the hands of Margaret Forbes and Ross M'Can on account of such estate, or of the share therein of Catherine O'Ferrall, and also to ascertain what, at the time of the marriage of Catherine O'Ferrall with the defendant John O'Ferrall, was the amount of her share and interest of and in such personal estate, and when, and by whom, and to whom, and in what manner, the same, and each and every part thereof, was paid, laid out, and invested, and what has become thereof, and what part thereof, and of the personal estate of the said testator, has at any time been paid to or received by or possessed by the defendant John O'Ferrall, and when, and by whom, and by what authority each and every part thereof was so paid, received, and possessed; and that it ought by such decree to be declared, that in taking such accounts against the estate of Margaret O'Ferrall and Ross M'Can regard is to be had to the accounts passed on the 26th of June 1792 and 4th December 1795; but that any of the parties are to be at liberty to show errors and omissions in such accounts, and that the Master is to be at liberty, in taking the accounts directed by the said decree, to correct any such errors and omissions; and that such decree should reserve the consideration of all matters relating to the settlements made upon the marriage of Catherine O'Ferrall with the defendant John O'Ferrall, and to the claims and liabilities of John O'Ferrall in respect thereof, and of the liabilities of the estate of the late Gerald O'Ferrall in respect thereof, and also the consideration of interest upon balances, and of the costs of the suit: And it is further declared, That

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the costs, charges, and expenses of the appellants in the said cross-appeal ought to be paid out of the fortune of the said Catherine O'Ferrall: And it is further ordered, That the cause be remitted back to the Court of Chancery in Ireland, to make a decree conformable to the above declarations, and to carry these directions into effect.

[13th May 1841.]

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The ATTORNEY GENERAL for the CROWN.

Sir WILLIAM FOLLETT for Mr. LE STRANGE STYLE-
MAN LE STRANGE.

Sir HARRIS NICOLAS for Sir JACOB ASTLEY.

A summons to parliament, and a sitting under it, is evidence of a title to a peerage descending to the heirs of the body including females; so likewise is it evidence of a similar title, where there have been several summonses, both prior and subsequent to a sitting in parliament, and a sitting in parliament, though no sitting under a summons, has been proved, proof being adduced that during the period of that sitting there were no writs of summons in existence.

THE petition of Sir Jacob Astley of Melton Constable in the county of Norfolk, and of Seaton Delaval in the county of Northumberland, praying that Her Majesty would be pleased to determine the abeyance of the barony of Hastings in his favour, by commanding a writ of summons to be issued to him by that title,

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together with Her Majesty's reference, and a report of the attorney general thereunto annexed, and a similar petition of Henry Le Strange Styleman Le Strange of Hunstanton in the county of Norfolk, with Her Majesty's reference, and the report of the attorney general, were severally referred to the committee for privileges.

From the evidence produced in respect of the pedigree it appeared to the committee, That Mr. Styleman Le Strange, claiming from Armine, the eldest daughter of Sir Nicholas Le Strange, and Sir Jacob Astley, claiming through Lucy, the second daughter of Sir Nicholas Le Strange, had proved their descent from Sir John de Hastings, the second baron, who sat in the House of Peers in the 18th Edward I. :

That the barony fell into abeyance on the death of Sir Hugh de Hastings in 1543 ; and that Mrs. Browne of Elsing Hall, near Dereham in the county of Norfolk, (who was not a claimant,) was descended from Anne Hastings, the eldest daughter of Sir Hugh de Hastings ; Henry Le Strange Styleman from Armine, the eldest daughter, and Sir Jacob Astley from Lucy, the second daughter, of Sir Nicholas Le Strange, who died in 1724.

In respect of the claim to the peerage it was proved, That on the 24th December, 49th Henry III., 1264¹, Sir Henry de Hastings, from whom the claimants are descended, was summoned by writ to parliament :

¹ This is the earliest writ of summons to parliament now extant, by which the baronies of Lord Despencer and De Roos have been created ; but as the rolls of parliament do not commence until the reign of Edward I., proof cannot be adduced from the parliamentary rolls of those peers having sat in parliament.

That in the 18th Edward I., 1290, Sir John de Hastings, second Baron Hastings, the son of Sir Henry de Hastings, was proved to have sat in parliament by the parliamentary roll; wherein it is stated that Sir John de Hastings, et ceteri magnates et procures tunc in parlamento existentes, had granted to the king, for the marriage of his eldest daughter, as much as Henry III. had received on the marriage of his daughter:

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That no writs of summons to parliament from the 49th Henry III. to the 23d Edward I. had been found:

That on the 23d, 27th, 28th, and 34th Edward I., and on the 1st and 6th Edward II., the same Sir John de Hastings was summoned to parliament, had a writ of summons to the coronation of Edward II., and died on the 6th Edward II., 1313:

That on the 6th and 18th Edward II. Sir John de Hastings (the third Baron Hastings), son and heir of the first Sir John de Hastings, was summoned to parliament, and died in the year 1325.

LORD CHANCELLOR.—This case has come before your Lordships under a reference by Her Majesty, upon a petition of Sir Jacob Astley, and another of Mr. Styleman Le Strange, claiming the barony of Hastings, which is stated to have been either created or certainly to have existed in the 49th Henry III.

The pedigree, so far as it traces the descent from the party in whom that barony was vested, appears to me, after a laborious investigation of the evidence affording the different links in the pedigree, to have been made out. At the same time there always is

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some degree of doubt in coming to a conclusion upon facts of such a very ancient date, and we always feel some hesitation in coming to a conclusion on evidence of that description. It does, however, happen in this case, that most of the steps of the pedigree are supported by public documents, inquisitions, and other instruments, which leave no doubt as to the facts which are stated in those documents; and, upon the whole, your Lordships will, I think, be safe in acting upon the evidence.

The evidence shews that the descent fell into abeyance in the year 1543. Anne Hastings, who was the daughter of Sir Hugh Hastings, and her sister Elizabeth, were the only two children of that Sir Hugh Hastings who would have been entitled to the barony if it had been claimed and acted on in the manner set out in this petition, and from that Anne Hastings is descended, not either of the parties claiming the title, but another party, who is not before your Lordships as a party claiming according to the form of proceeding which is adopted by your Lordships in cases of this sort. Mrs. Browne is proved to have been descended from that Anne Hastings; she, therefore, would be one of the parties in whom the title is vested as a co-heir.

The other sister, Elizabeth, is the ancestor of both the other claimants, Mr. Styleman Le Strange being descended from Armine, who was the elder daughter of Sir Nicholas Le Strange, and who died in the year 1768, and Sir Jacob Astley being descended from Lucy, the younger sister of that Armine. There are three parties, therefore, in whom the title is vested; Mrs. Browne, who is descended from the elder branch,

and the other two, who are descended from the junior branch, namely, the daughters of Sir Nicholas Le Strange.

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Some questions have been raised at your Lordships bar, which, undoubtedly, are entitled to the most serious consideration. The first of those is, how far there has been proved in this case that which is required, in the absence of a patent, to establish a title descendible to heirs general, namely, a summons and a sitting. That a summons and a sitting constitute a title descendible to heirs general has been established and acted upon in so many cases that I need not now consider it a question open to discussion. The point, therefore, is, in this case, whether there has been proved that which, according to former decisions, constitutes a title to a dignity of this description. The other is a point, not of law, but rather of fact, namely, whether the absence of any exercise of the right to this title, from the time when it is proved to have been last held by Sir John de Hastings, who died in the year 1389, does not raise a presumption that there must at that time have been something, which cannot now be traced, which precluded the party, who would otherwise have been entitled, from claiming the barony at that period.

Though length of time itself is undoubtedly no bar to a claim, yet when you are examining matters of fact, and are endeavouring to ascertain the rights of persons who now come forward to claim a dignity, undoubtedly it raises a great presumption against the validity of that claim when you find a dignity, descendible at a particular period, in a way that would entitle a party to take it up, and you find that that claim was not made, or, at all events, that the party did not

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succeed, unless there are circumstances in the case which enable your Lordships to come to a satisfactory conclusion, that the circumstance of the dignity not having been taken up is satisfactorily explained. Where a title falls into abeyance, and is claimable either by two sisters, or the descendants of two sisters, no doubt the presumption against the title does not arise, because neither of those parties could assert a right to the title without the assent of the crown; and if the crown did not think proper to exercise its prerogative, by deciding to which of the two sisters the title should descend, neither party could assert her title in her own right. If the crown does not so decide in the first instance, it may go on from generation to generation; and the circumstances, therefore, of it falling into abeyance, and not being claimed, undoubtedly do not raise any strong presumption against the claim.

There have been cases before your Lordships in which you have reported in favour of the titles, where that circumstance did not exist, and where the title appears not to have been taken up by the next possessor, it not appearing that the circumstances of the case were such as presented any impediment which would have prevented him from claiming the title. It must always depend upon the particular circumstances of each case; it is, at most, but a case of presumption, that is to say, a presumption that there must have been something which cannot now be discovered, which might have prevented the party who would otherwise be entitled to the dignity from claiming it.

With regard to the first of those points, namely, how far, in this case, there has been a summons and a sitting, both being necessary to constitute a title to the

dignity claimed, the facts may be very shortly stated. Sir Henry de Hastings, the father of Sir John de Hastings, from whom the claimants are descended, appears to have been summoned to parliament on the 24th day of December in the 49th year of Henry III. ; of that there appears to be no question ; the proceedings in parliament at that period are preserved, and they prove the fact ; but there is no evidence that that Sir Henry de Hastings sat in parliament ; there is undoubted proof of his having been summoned, but no proof of his having sat. His son John de Hastings is, I think, clearly proved to have sat in parliament the 18th Edward I.

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A sitting in parliament must be proved by some proceeding in parliament itself, and there is produced and proved, as of the date of the 18th Edward I. in the year 1290, a document professing to be in the nature of a grant to the king, described to be "in pleno parlamento ipsius domini Regis," which states the barons and lords present, and, among others, Johannes de Hastings, and, after naming others, it says, "et ceteri magnates et procures tunc in parlamento existentes." The grant is stated to have been not properly the subject of a grant by parliament, but, whether properly the subject of a grant by parliament or not, is, I apprehend, not material, provided it appears clearly that it was a proceeding in parliament, and the document itself states that it was "in pleno parlamento," and states the parties present to have been, among others, "Johannes de Hastings, et ceteri magnates et procures tunc in parlamento existentes."

There is nothing to impeach this as having been a proceeding in parliament ; it is, therefore, a parlia-

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mentary proceeding, recognizing Johannes de Hastings as being then a member of your Lordships House, and I apprehend it comes therefore within all the rules by which your Lordships try the fact, of whether there has been a sitting. This has not been or pretended to be the great difficulty in the present case; but the difficulty in the present case is, that there is no proof produced of the summons of that Sir John de Hastings to sit in that parliament. At a subsequent date there are many instances proved of the same individual having been summoned; but then, in those subsequent parliaments, there is no proof of his having sat.

Now your Lordships, in investigating this, find this as a matter of fact. You find an individual whose father was certainly summoned to parliament; you find the same individual summoned to subsequent parliaments; and you find the same individual sitting in a preceding parliament; and the question is, whether there be any rule by which your Lordships are to be guided in coming to the conclusion that he was regularly summoned to the parliament in which you find that he sat. I apprehend that there is no such rule; but, although it is quite clear that in order to constitute the dignity claimed there must be a summons and a sitting, your Lordships having the fact of a sitting proved, must, according to the ordinary rules, investigate the question, whether that sitting was or was not under a summons, of which there is now no positive proof. Under the decisions, strictly speaking, the proper test and evidence of a summons would be the writ itself; but there are many cases in which writs cannot be produced, and in this case there is proof

that the writs of that period, that is, the period covered by the year 1290, in which this individual must have been summoned, if summoned at all, are not forthcoming. The case, therefore, as far as regards summons, rests on this individual himself having been summoned at different periods, your Lordships not having the summons produced for this period, but having the fact of his having sat in parliament in that year.

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Under these circumstances, it appears to me that your Lordships may be well justified in coming to the conclusion that he had a writ of summons, which, at that period, would alone entitle him to sit in this House; for the only suggestion consistent with his having sat in this House at all without a summons would be his having intruded himself into the House without authority; whereas no peer at that time, nor at the present time, could enter this House without having his summons with him. The question is, whether your Lordships are to presume that he was there without that legal authority, or whether, connected with other collateral facts, of a summons at an earlier period, and summonses at a subsequent period of time, your Lordships may not safely come to the conclusion that he was summoned at that time upon the principle of law *omnia præsumuntur legitime facta donec probetur in contrarium*. I apprehend your Lordships may do what you have done on former occasions; presume, upon the collateral evidence in this case, that that took place which alone could justify the sitting, namely, that Sir John de Hastings was summoned to parliament in the 18th Edward I.

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Take Sir John de Hastings, because there is no evidence of Sir Henry de Hastings having sat, though no moral doubt can exist of his having been the peer from whom Sir John de Hastings derives his title; but when a party is claiming a dignity, and he derives his title from some individual as his ancestor, he is bound to show the concurrence of those two circumstances of a summons and a sitting in that ancestor.

It appears to me that your Lordships are acting within the principle which has regulated your former proceedings in cases of this sort, in coming to the conclusion upon the evidence, that Sir John de Hastings was summoned and sat in the parliament of the 18th Edward I.

The title descended in the issue of that Sir John de Hastings through several generations; that Sir John de Hastings having had one son, whose issue enjoyed the barony for a certain period of time, but which issue failed in the year 1389. That Sir John de Hastings had also a daughter, Elizabeth, who married Lord Grey de Ruthyn, from whom another line descended, now represented by Lady Hastings.

Upon the failure of the line of the son of Sir John de Hastings, Sir John de Hastings, Sir Lawrence de Hastings, and then Sir John de Hastings again, upon the failure of that line, Sir John de Hastings having, it is very clearly proved, married another wife, both of his wives being named Isabel,—from his second wife was descended Sir Hugh Hastings, who is the ancestor of the present claimant. According to the rules of law the barony would, on his decease, have fallen to the Hugh Hastings who was descended in that line, who

died in 1396, and upon his death it would have gone to his brother Sir Edward, and thence arises the second difficulty which has been suggested at your Lordships bar. I do not detain your Lordships by observing upon the difficulty, which at one time was suggested, of the proof of the second marriage of Sir John de Hastings with Lady Isabel, the daughter of Hugh Le Despenser, because it appears to me, upon looking at the inquisitions which have since been produced, that that fact is very satisfactorily established; and there is no doubt that Sir John de Hastings, by his second marriage with that Isabel, had the descendants who are represented in this pedigree as being the ancestors of the present claimants.

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Then this question arises:—Sir John de Hastings, who died in 1389, was the last possessor of the dignity; and there was this difficulty raised at your Lordships bar;—that the male descendants of the second wife of Sir John were the parties entitled to the peerage, but that they did not make any claim to it, and that from that period to the present there has not been any enjoyment of the dignity by any person to whom, under those circumstances, it would vest.

If the case had stood nakedly upon those facts, although there are cases which would justify your Lordships in passing over that difficulty, and not concluding the case on account of not being able to explain how that happened, there would have been great difficulty in assuming that they were, in fact, entitled to the dignity, when no person descended from Sir John de Hastings had, during so long a period, asserted that title. But the circumstances of this case appear to me

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to remove that difficulty; because it appears that upon the death of the male line of Sir John, called the second Baron Hastings,—there being descendants of Elizabeth, the daughter of that Sir John,—the question arose, how far the descendants of that daughter were entitled, in preference to the descendants of the son of a subsequent marriage, there being a rule of law applicable to land, and the question arising, whether the rule of law applicable to land did or did not apply to a dignity.

It is also proved that a contest arose¹ between the

¹ The controversy arose between Reginald Lord Grey of Ruthyn, the heir of the whole blood of the third Earl of Pembroke, and Sir Edward Hastings, the collateral heir male, respecting the right to bear the arms of Hastings, without a mark of difference or abatement.

Though merely called “a plea of arms,” it would appear that the honours as well as the arms of the family were involved in the question, it being then understood that dignities, like lands, descended upon the heir of the whole blood of the person last seised, instead of upon the heir of the person first created. Reginald Lord Grey, who asserted that “the arms, inheritance, and name of Lord Hastings” belonged to him, assumed that title, and it was always borne by his descendants, the Lords Grey de Ruthyn and Earls of Kent, until 1641, when the House of Lords, after referring the question to the Judges, resolved that the Lords Grey de Ruthyn never had any right to the barony of Hastings.

Sir Edward Hastings, however, also assumed the title of “Lord Hastings,” and never relinquished it. On the 9th of May, 11 Hen. IV. 1410, the controversy was decided in favour of Lord Grey de Ruthyn; but Sir Edward Hastings immediately appealed against the judgment; and on the accession of King Henry the Fifth a new commission was appointed for hearing the appeal. The proceedings were interrupted by the absence of one of the commissioners, and afterwards by the expedition to France in 1415, Sir Edward Hastings having been retained to serve in the retinue of the Earl of Dorset, by indentures dated in May 1415, under the designation of “Edward Seigneur de Hastings et de Stuteville.” In 1417 the appeal was resumed, but (as would appear from a petition of Sir Edward Hastings to the King, about 1421,) before judgment was given he was arrested by Lord Grey for the sum of 987*l.*, the costs of the original suit, and was thrown into the Marshalsea.

Fearing that the payment of those costs would be deemed an acknow-

descendants of that Elizabeth and Sir Edward Hastings, and that that contest continued for a considerable length of time, and was not determined until the year 1641, upon the question how far the dignity was affected by the rule of law applicable to land. And I wish to call your Lordships attention to the fact, that when that contest was determined, and that question of law was decided, the title was in abeyance between Anne Hastings

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ledgment of Lord Grey's right to the honours and arms of his family, Sir Edward Hastings continued a prisoner for twenty-six years, part of which time he was, he says, in some pathetic documents on the subject, "boundyn in fetters of iron lyker a thief or a traitor than like a gentle-
"man of birth." Imprisonment and chains, the destruction of his own health, and the death of his wife and children, could not shake his firmness. He steadily refused Lord Grey's offer to release him from the debt, if he would admit his superior right to the objects in dispute. The only compromise to which he could be induced to consent was a marriage, either in his own person, or in that of one of his children, with one of those of his adversary; and in case his eldest son John Hastings should marry one of Lord Grey's daughters, he said he would relinquish to him and the heirs of that marriage "the name, right, inheritance, and arms," &c., which he claimed as heir of John last Earl of Pembroke, "for I
"doubt not," he says, "to shew the possession, right, and claim of my
"father, my brother Hugh, and to me descended as well by right and
"position of arms, as it is to shew by diem clausit extremum for two
"parts after the decease of John Hastings last Earl of Pembroke, as
"for the third part to me after the decease of the last Countess of
"Pembroke; which descent, right, claim, and inheritance, God's curse
"and mine have all mine heirs that will not sue the right after me,
"and upon these points I will life;" adding, "for plainly
"I will never renounce my right without that my son have a great
"parcel of my right, other than in semblable wise as I have proffered
"you."

The latest of those remarkable papers, now extant, was written about January 1493-4, when Sir Edward Hastings was still in prison, and in which, as before, he styled himself "Edward Lord Hastings." After 1494 nothing has been discovered respecting him, except his death in January 1497. His son, John Hastings, warned, perhaps, by his father's unhappy fate, seems to have yielded to the usurpation of his rights by the Lords Grey of Ruthyn; and in the reign of King Henry the Eighth the representation of the house of Hastings fell among co-heirs, in which state it has ever since continued, and now remains.—*From the original documents in the possession of Mr. Styleman Le Strange.*

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and Elizabeth, the daughters of Sir Hugh, who died in 1514. From the year 1514 the title was in abeyance; and in 1641, when it appears that it was decided that the *possessio fratris* did not apply to a dignity, the parties then claiming the benefit of this dignity were not persons who could of their own authority take it up and exercise the privilege, but they were the descendants of daughters who could not claim the peerage without the act of the crown declaring in whose behalf the abeyance should be determined.

Therefore, at that period of time, it was precisely the same question that has been so often determined with respect to a title in abeyance, in which case there is no presumption arising from no claim having been made, because there is no right in either party to enforce that claim. When, therefore, your Lordships see, that at the period at which the ancestors of the present claimants would have been entitled to assert a title to the present dignity a question of law existed which prevented that right from being asserted until a period at which the title descendible in the line of issue male of the second marriage had fallen into abeyance, I think you have circumstances proved sufficient to explain how it happened that the title had been so long suspended, and why no person came forward to assert it.

This being the only circumstance in this case in which it differs from many others which your Lordships have had before you, and there being quite sufficient, in my opinion, to induce your Lordships to come to the conclusion that this point is not sufficient to overturn the title as derived from the evidence which

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has been given, I should recommend your Lordships to come to the conclusion, that the claimants have made out their title; that is to say, that Mr. Styleman Le Strange, claiming from Armine, the eldest daughter of Sir Nicholas Le Strange, and Sir Jacob Astley, claiming through Lucy, the second daughter of Sir Nicholas Le Strange, have proved their descent from Sir John de Hastings, the second baron, who appears to have sat in this House in the 18th of Edward I., and held the dignity of the barony of Hastings; that it appears that the dignity fell into abeyance on the death of Sir Hugh Hastings in 1540; and that Mrs. Browne, who is not claiming, but whose title has been proved by the other claimants, is descended from Anne Hastings, the eldest daughter of Sir Hugh Hastings, who died in 1514, and which was therefore the elder branch. If your Lordships come to this decision, you will ascertain the fact that the barony was in abeyance in those three individuals, and that it will remain so till the crown think proper to determine it. I move your Lordships to find that the barony of Hastings was vested as a barony descendible to heirs general of the body in John de Hastings, who died in 1313, and that the said John de Hastings Baron Hastings was summoned to and sat in parliament in the 18th of Edward I., and left one son and daughter Elizabeth by his first marriage, and two sons by his second marriage; that the issue of the said John, the son of the said Baron Hastings, by his first marriage, failed in 1389, and that Frances, the wife of the Reverend Richard Browne, Henry Le Strange Styleman Le Strange, and Sir Jacob Astley, Baronet, are descended

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from the eldest surviving son of the said Sir John Baron Hastings, who died in 1313, by his second marriage ; and that the said barony is in abeyance between the said Frances Brown, being descended from Anne, the eldest daughter of Sir Hugh de Hastings, who died in 1540, and the said Henry Le Strange Styleman Le Strange, and the said Sir Jacob Astley, being descended from Elizabeth, the younger daughter of the same Sir Hugh Hastings, the said Henry Le Strange Styleman Le Strange being descended from Armine, the eldest daughter, and the said Sir Jacob Astley being descended from Lucy, the second daughter of Sir Nicholas Le Strange, who died in 1724.

The same was determined in the affirmative, and the Chairman was directed to report the same to the House.

[*25th and 27th May, 3d and 7th June 1841.*]

(From the Court of Chancery, Ireland.)

JOHN MALONE of Rathcaslin in the County of
Westmeath, Appellant.

JOHN MALONE of Coburg Place in the City of
Dublin ALICIA O'CONNOR, HUGH MORGAN TUIE,
THOMAS ARDILL, HENRY O'CONNOR, THOMAS RICH-
ARD ROOPER, JOHN CONROY BROWNE, EDMUND
L'ESTRANGE, GEORGE L'ESTRANGE, GEORGE HENRY
L'ESTRANGE, ALICIA STEPNEY, HENRY STEPNEY,
ST. GEORGE STEPNEY, PATRICK POWER, MICHAEL
WHITEHOUSE and CATHERINE his Wife, JOHN
MALONE of Gardiner Street, and SAVILLE RICHARD
WILLIAM L'ESTRANGE, Respondents.

J. M. brought his bill against an infant and several other
defendants, claiming, as against them, certain estates,
upon two points,—one of law, upon the construction of
Lord Sunderlin's will,—the other of fact, that he was
the heir male of Lord Sunderlin, charging by his bill
that the marriage between his father and mother took
place in or about the month of January 1801. With
the consent of all parties, one of them being an infant,
an issue was directed to inquire whether the plaintiff
was the heir at law of his father; and the plaintiff, by

the evidence of his mother, proved that the marriage took place in January 1801, and that her son Anthony was born in July of the same year (which would have negatived the claim of the plaintiff, by proving that he had an elder brother); but she swore that Anthony was the last child born before and the plaintiff the eldest son born after her marriage. The infant, having afterwards attained twenty-one, was permitted to put in a new answer, and make a new defence; and it was afterwards ordered that a new trial of the issue should take place, with liberty for him and other defendants to appear by counsel on the trial, and to give the judges report in evidence in respect of those witnesses who, having given evidence in the first trial, had died.—Held, that though it is a matter of discretion in a court of equity whether it will first decide the law or the fact, that the Court had, in the present instance, exercised a sound discretion in adopting the latter mode, inasmuch as all but one had concurred in that course, and a different course as to one might have led to different determinations upon the same point:

That the issue directing the jury to inquire whether the plaintiff was the heir at law was the proper issue to be tried:

That though the date of the marriage proved was at variance with that alleged on the record, the Court was right in not dismissing the bill, but granting a new trial, on the ground of their being a misapprehension of the date or the facts:

That the infant, though strictly speaking not a party to the issue, being permitted to make a new defence, was bound by the issue:

That the judges report was properly directed to be received in evidence, being evidence between the same parties and to the same point.

Quere, Whether a party who was an infant when a decree was pronounced, would, in a case like the present, be entitled to be let into a new defence?

THE Right Honourable Anthony Malone, being in and previous to the year 1774 seised in fee simple of real estates, of his own acquisition, also seised for life, with remainder in tail male to his nephew Richard Malone afterwards Lord Sunderlin, of certain other lands, and seised for life, with remainder for life to his said nephew, of certain fee farm rents, which estates held by him for life were his paternal estates, by his will of the 12th July 1774, after charging the estates of his own acquisition with certain legacies, devised the estates of which he had the power to dispose in the following words:

“ It is my will, and I do accordingly devise all my
 “ real and freehold estates of my own purchase or ac-
 “ quisition, or over which I have any power or dominion
 “ enabling me to dispose thereof, situate in the counties
 “ of Westmeath, Roscommon, Longford, Cavan, and
 “ the county of the city of Dublin, or elsewhere in the
 “ kingdom of Ireland, unto my nephew Richard Ma-
 “ lone, the eldest son and heir of my lately deceased
 “ brother Edmond Malone, in whom I place the ut-
 “ most confidence, his heirs and assigns for ever; not
 “ entertaining the least doubt but that he will in due
 “ time, and upon the first proper occasion, take care
 “ not only to have the said estates, so devised to him by
 “ me, but my paternal estates settled in such manner
 “ that the said estates may continue in the male line of
 “ our family, and in our name and blood, and go to
 “ the several branches of it in succession, one after
 “ another, according to their priority of birth and
 “ seniority of age, the elder and his issue male being
 “ always preferred to the younger and his issue male,
 “ according to the usual course of family settlements,

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“ as by the rules of law the same may be properly done.
 “ And I do hereby most earnestly recommend it to my
 “ said nephew to see the same so settled, still, however,
 “ reserving to himself, and limiting to all the male
 “ branches of our family to whom estates only for life
 “ shall be limited in remainder or succession, all such
 “ proper and reasonable powers as are usually given
 “ and attendant upon such limited estates, in order to
 “ enable him and them, as they shall be respectively
 “ seised in possession, to settle jointures upon their
 “ wives in such manner as they shall happen to marry,
 “ and to provide for their younger children, or for their
 “ daughters, if they should happen to have daughters
 “ only, and no issue male, and to make leases for reason-
 “ able limited terms when they shall be respectively
 “ seised, and in actual possession by virtue of any re-
 “ mainder that shall be so limited to them respectively,
 “ and all such other reasonable powers as my said
 “ nephew may think necessary or expedient to add, in
 “ order to guard against the consequences of unfore-
 “ seen accidents or events. And I do hereby appoint
 “ my said nephew Richard Malone sole executor of
 “ this my will, and request that he will take upon him
 “ the execution thereof, and the performance of the
 “ trusts thereby reposed in him.”

On the 8th of May 1776 the testator died, and there-
 upon his nephew Richard Malone afterwards Lord
 Sunderlin entered upon the estates of the testator, as
 well the fee simple estates as those which he held for
 the term of his life.

Anthony Malone at the time of his death left sur-
 viving him the following persons, and no other, of the
 male line of his family, and of his name and blood;

(that to say), the devisee, Richard Malone afterwards Lord Sunderlin, Edmond Malone, brother of the devisee, who were the sons of the testator's eldest brother Edmond, Henry, Richard, and Anthony Malone, the sons of Richard Malone, the testator's youngest brother, and Richard Malone, only son of the aforesaid Henry Malone.

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Edmond Malone, the brother of Lord Sunderlin, died in the year 1812 without issue. Henry Malone died in the year 1814, leaving Richard his only son, and two daughters, Alicia, afterwards the wife of Henry O'Connor, and Catherine, afterwards the wife of Michael Whitestone. Lord Sunderlin died in April 1816, intestate, and without issue, having by recoveries acquired the fee of the paternal estates, leaving Henrietta Malone and Catherine Malone, his two sisters, who, as his co-heiresses, upon his death entered upon the estates.

In December 1816, Richard Malone, the son of Henry, instituted a suit in Chancery against Henrietta and Catherine Malone, for having the paternal and acquired estates of Anthony Malone settled in such manner as his will directed.

The cause was partly argued before the Chancellor, when, in consequence of a compromise between the parties to the suit, a deed, dated the 1st of June 1820, was executed by them, whereby the paternal and acquired estates of Anthony Malone were conveyed to trustees by Henrietta and Catherine Malone, upon trust that they should receive for their lives or the life of the survivor an annuity of 3,000*l.*, and, subject thereto, to the use of Richard Malone for life, with remainder to his first and other sons in tail male, with remainder to him in fee.

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Under the deed of the 1st of June 1820 Richard Malone entered into possession of all the estates, and by his will, dated the 16th of April 1830, gave all his estates, real and personal, to Henry O'Connor, since deceased, and to Alicia O'Connor his wife, Hugh Morgan Tuite, and Thomas Ardill, upon trust, after certain payments therein mentioned, to convey the paternal and acquired estates of Anthony Malone to Alicia O'Connor and Henry O'Connor, since deceased, for their lives and the life of the survivor, with remainder to Edmond Malone, since deceased, eldest son of Edmond Malone of Ballinahoun, for life, with remainder to his first and every other son in tail male, with remainder to the appellant John Malone, the second son of the said last-mentioned Edmond Malone, for life, with divers remainders over.

On the 16th January 1834 Richard Malone, the son of Henry Malone, died without issue, leaving his sisters, Alicia O'Connor and Catherine Whitestone, his co-heiresses at law, who were also co-heiresses at law of Lord Sunderlin, and of Anthony Malone; whereupon the respondent John Malone, of Coburg Place, claimed, as the eldest son of Richard Malone (who had died in 1806),—which Richard Malone was the son of Richard, which Richard was one of the brothers of Anthony Malone, the testator,—to be entitled as heir male of that Anthony, under the limitations contained in his will, and on the 11th August 1836 filed his bill against the respondent John Malone, of Gardiner Street, who claimed the estates as heir male of Anthony Malone, alleging that the father of the respondent John Malone, of Coburg Place, had died without lawful issue; and also against the appellant and the other respondents,

who derived their title to the estates from the will of the testator Richard Malone; stating the facts before mentioned, and alleging that the defendants at times pretended that said Richard Malone, the respondent's father, died without lawful issue, and that the respondent was not, as his son and heir, entitled to the said estates, respondent not being, as the defendants alleged, legitimate, in consequence of some alleged informality in the marriage of respondent's father and mother, the contrary of which pretence the respondent charged to be the truth, his father and mother having been legally and duly married before the birth of respondent. And the respondent further alleged in his bill, that the said defendants at other times pretended, that although a marriage was solemnized in the month of January 1801, which was before the birth of respondent, between the said Richard Malone and respondent's mother, yet such marriage was not valid, inasmuch as the same was celebrated by a Roman catholic clergyman, the said Richard Malone being then a protestant. And the respondent further charged, that although his said father had been educated and brought up a member of the established church, yet, several years before his said marriage with the respondent's mother, his said father became, and at the time of said marriage was, and thenceforth continued to be and profess himself, a Roman catholic, and that he ever after lived in that faith, and died therein; and that the said marriage was legally solemnized between his father and mother, then both professing the Roman catholic religion. And the bill charged, that the said marriage took place in or about the month of January 1801, in the chapel of Townsend Street in the city of Dublin; and the bill

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prayed, amongst other things, that the trusts of the will of the said Anthony Malone might be carried into execution, and that the respondent's kindred and degree of relationship to the said Anthony Malone might be ascertained, and that the respondent might be decreed entitled to an estate in tail male in possession in all the estates devised by the will of said Anthony Malone; and for an injunction and receiver.

The respondents by their answer submitted that Anthony Malone had made no declaration of trust binding upon Lord Sunderlin; and denied that the father and mother of the respondent were duly or legally married before the birth of the respondent, and insisted that such marriage, as was alleged by the respondent to have taken place, if any such had been celebrated, was not valid, inasmuch as same was celebrated (if at all) by a Roman catholic clergyman only; the father having been at the time of the alleged marriage, and until his death, a protestant of the church of England. The appellant, then a minor, by his answer, submitted his rights to the protection of the Court.

The plaintiff, for the purpose of proving the marriage of his father and mother, examined his mother, Bridget Malone, who, after having deposed to a former marriage between her and Richard Malone, which was celebrated by a degraded Roman catholic priest, and which was invalid, deposed, that she went to Preston in Lancashire, and resided there for nearly two years, that a second ceremony of marriage was performed between them in Townsend Street chapel, then called Lazars Hill, in January 1801, by the Reverend Patrick Smith, a Roman catholic priest; and that at the period of the said marriage, and for some years before, she and her

husband both professed the Roman catholic religion ; and she further deposed, that her youngest child living, when the second marriage took place, was named Anthony, who was then about six months old, and was born at Preston, and that the respondent, the plaintiff, was the first child born after the second marriage. In another part of her depositions she stated that her son Anthony was born in Preston in the month of July 1801, and that the marriage took place after her return from Preston to Dublin ; that her son Anthony was living, from whom she had received a letter two years ago. The plaintiff examined another witness present at the marriage, who stated that the marriage was celebrated in January 1801 ; and the marriage was entered by the priest in the register book of the chapel of Townsend Street, under the general date, at the head of the page, of January 1801 ; and the entry seemed to have been inserted after the entries written under it had been made.

On the 13th May 1837 the cause came on to be heard, when the counsel for the appellant submitted to the Court that, as he would be adult in March following, the cause should stand over as to him ; but counsel for John Malone of Coburg Place objecting, the cause proceeded ; whereupon the Lord Chancellor, by consent of all the parties, given by counsel in open court, ordered, that an issue should be tried, John Malone of Coburg Place being plaintiff, and Alicia O'Connor, Hugh Morgan Tuite, and Thomas Ardill, defendants, with liberty for John Malone of Gardiner Street to attend by counsel at the trial, to inquire whether the plaintiff John Malone of Coburg Place was the heir at law of his father Richard Malone, deceased. On the

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6th of December 1837 the issue came on to be tried, and after the trial had lasted several days a verdict was found for the plaintiff John Malone of Coburg Place.

On the 12th January 1838 the defendants in the issue applied for a new trial, on the grounds that the case made by the plaintiff varied from the case made in the equity cause, that the defendants were surprised at the trial, that the verdict was against evidence, and illegal evidence had been received; whereupon, by an order of the 19th of February 1838, it was ordered, that there should be a new trial of the issue by the order of the 13th of November directed, with liberty to the respondent John Malone of Coburg Place to give the former verdict in evidence, as he might be advised; and as to evidence on the new trial of any of the witnesses who might have died since the former trial, it was ordered, that the Judge's report should be received in lieu thereof. A new trial was had, and, on the 4th December 1838, the plaintiff obtained a verdict, but none of the defendants appeared on the trial.

On the 18th June 1838 the appellant, having on the 25th March of that year attained twenty-one, in pursuance of an order of the 9th of June 1838, upon an application made by him for that purpose, put in a new answer, and insisted, upon the same grounds as the other respondents had done, that the respondent John Malone of Coburg Place was illegitimate; but that if any marriage had taken place between his father and mother, that the marriage had taken place in January 1801, and his brother Anthony, who was born in July 1801, was his elder brother, and had a

prior claim ; and, having entered into evidence, the cause came on to be heard before the Lord Chancellor on the 5th December 1838, when the Court declared as follows :—" This cause being set down by the plaintiff " to be heard against the defendant John Malone, " (the appellant), and his counsel having insisted " that upon the pleadings and proofs in this cause " the plaintiff's bill should be dismissed, the Court " is pleased to declare that the same ought not to be " so dismissed. And the Court declining to enter " into the consideration of the question as to the " construction of the will of the Right Honourable " Anthony Malone, in the pleadings mentioned, until " the right of the plaintiff to raise that question shall " have been first determined, it was ordered, that the " cause should stand over to be heard, for further " directions against the said defendant John Malone, " at the same time as the same shall be heard against " the several other defendants."

The plaintiff served a draft of the decree, and proceeded to make up the decree ; but the appellant having objected, it was never made up or signed by the registrar.

The respondents Alicia O'Connor, Hugh Morgan Tuite, and Thomas Ardill having appealed against the order of the 19th of February 1838, on the 6th day of June 1839 the House of Lords ordered, that the order of the 19th of February 1838 should be varied by omitting such part thereof as directed the plaintiff to be at liberty on such new trial to give the former verdict in evidence, and that the defendants Alicia O'Connor, Hugh Morgan Tuite, and Thomas Ardill,

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the trustees, should pay the costs of the former trial, and that, subject to such variation, the order should be affirmed.

On the 15th of November 1839 the cause came on to be heard, on the order of the House of Lords, the certificate of the second trial, and for further directions, and a supplemental suit against Saville Richard William L'Estrange, the first tenant in tail under the will of Richard Malone, when it was ordered, that the order of the 6th of June 1839 should be varied in the manner directed by the House of Lords; and it was ordered, that a new trial of the said issue should take place, with liberty for all the parties in the first cause to appear by counsel on the trial, and as to any witnesses examined at the first trial who were dead, the Judge's report to be received in lieu of their evidence, with a reservation of costs, and further directions. And it was further ordered, in the supplemental cause, that the defendant Saville Richard William L'Estrange should be at liberty to appear by counsel at the trial of the issue, and to make full defence, in like manner as if he had been a defendant to the issue; and that the supplemental cause should stand over to be heard at the same time as the original cause.

At the sittings after Hilary Term 1840 a new trial of the issue was had, when, after a trial of nine days, the jury was discharged by the learned Judge, the jurors not having been able to agree to a verdict.

From the orders of the 13th November 1837, the 5th December 1838, and the 15th November 1839, the appellant appealed.

Mr. Pemberton and Mr. Knight Bruce for the Appellant.—When the cause came on to be heard, the appellant, being an infant, objected to the cause being heard till he came of age; the objection was overruled, and an order made for the trial of the issue, with the consent of all parties. The appellant, being an infant, was incapable of giving his consent and attending at the trial. He did not consent; the statement of his consent is an error upon the record, and he is not bound by the trial. The issue as directed is improperly framed. The plaintiff might have been the heir at law of his father, and yet not entitled under the description in the will; his brother might have been living at the time the bill was filed, and died afterwards. The bill ought to have been dismissed, as the case put upon the record differs from the case proved. The validity of the marriage depends upon the date; and if the marriage, as alleged in the bill, took place in January 1801, there is an elder son who was born subsequent to the marriage. The Court, before it directed an issue, ought to have first put a construction upon the will. The whole expense of the trial may be useless if it eventually turns out that there is no trust. In *Gordon v. Gordon*¹ Lord Eldon stated, that the expense and time of the trial was wasted, and that the right ought to have been decided before the character assumed by the plaintiff had been established. So *Blackburn v. Jepson*²; and in *Lynn v. Beaver*³ the trial was stayed until a construction had been put upon the will. There is a serious doubt if the plaintiff succeeds in the issue whether he will be entitled under the will. The later cases have restricted cases of this

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¹ 3 Swanston, 459.

² 17 Vesey, 473.

³ 1 Tur. & Russ., 63..

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nature. *Cunliffe v. Cunliffe*¹; *Knight v. Knight*²; *Meredith v. Heneage*.³ There is not sufficient certainty either as to the objects or as to the subject matter devised. There is a different direction with regard to *L'Estrange* and the other parties. Under the liberty for all parties to appear by counsel, they could not address the jury or call witnesses. *Wright and another v. Wright*.⁴ And it is ordered that the Judge's report be received as evidence, as far as regards those witnesses who have died in the absence of the appellant, who had no opportunity of a cross-examination; and they cited *Cockburne and Hussey*⁵, and *Blake and Veysie*.⁶

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Sir William Follett and Mr. Jacob for the Respondents.—There is a mistake as to the dates, but there is no misapprehension as to the facts. Anthony was born at Preston before the marriage, and the appellant was born after their return to Dublin. It frequently happens in trials at nisi prius that there are contradictions as to dates, though the facts are correct. The right course, therefore, under these circumstances, was to submit the case again to the jury, which, with certain variations, was so established by this House. The appellant puts in his answer, enters into evidence, and makes the same defence as the respondents; it is too late to object to the trial of this issue; the right of the plaintiff to be heard depends upon this issue; the right to be heard did not depend upon the issue directed in *Gordon v. Gordon*. When the plaintiff has established his legitimacy, then the Court will enter into the construc-

¹ Ambler, 686.

² 3 Beavan, 148.

³ 1 Simons, 542.

⁴ 7 Bingham, 459.

⁵ 2 Ridgeway, 504.

⁶ 3 Dow, 192.

tion of the will; this is not the proper time to enter upon that subject. The bill ought not to be dismissed, because the bill alleges a marriage in 1801, and there is evidence of a marriage in 1802. It might have been a surprise, and upon that ground a new trial was directed, and this House affirmed that order; but then it is said the issue is not properly framed. If the plaintiff is the heir at law, he must be the heir male, and this is the common form. With regard to his not being able to address the jury, the practice is not uniform. In a case in which Sir William Follett was counsel, Mr. Earl, under a similar direction, addressed the jury. When an issue is drawn, the parties agree who are to have the conduct of it; if the parties are dissatisfied with the directions, they can apply to the Court for other directions. Issues do not bind any particular person; they are directed to inform the conscience of the Court. In *Rhodes v. De Beauvoir*¹ the Tibbutts were ordered to be examined as witnesses, yet they are interested, and were ordered to attend. In *Blundell v. Gladstone*, before the Vice Chancellor, which is not reported, twenty or thirty persons were interested under the will, yet there was only the tenant for life plaintiff, and one defendant; the remainder-men and other parties interested did not have liberty to attend the trial, not having desired it. In the Duke of Roxborough's case a great number of persons were interested and only some of the parties were ordered to try the issue. In *Humphreys v. Hollis*² three persons who were interested, were not made parties to the issue, and there an action was held to have been properly tried during an abatement by the

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¹ 6 Bligh, 195.

² Jacob, 73.

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death of one of the defendants, who was not directed to attend the trial. These parties, though they do not attend the trial, are bound by the issue. Infants likewise are bound by a decree taken by consent. *Wall v. Bushby*.¹ If the plaintiff wanted to vary the order, he ought to have applied for a rehearing. In *Kelsall v. Kelsall* ², the Court allowed an infant, after decree, upon his attaining twenty-one, to make a new case. The direction that the Judge's report should be read has been affirmed by this House. The depositions of deceased witnesses might have been read without any order for that purpose. The Judge's report was ordered to be read, in order to save expense of proof.

Appellant's
Argument.

Mr. Pemberton in reply.—The plaintiff having put his case upon a marriage of 1801, it was proved an eldest son was born in August of that year. He disproved his own case, and the Court ought to have dismissed the bill. If the plaintiff had intended to have made a new case, he ought to have applied to the Court to amend the record, or file the supplemental bill for that purpose. The mother, a witness, and the priest who makes the entry, all concur in fixing the date of the marriage as being in January 1801. If ever there was a state of circumstances favourable to the construction of the law, before the fact of legitimacy was tried, this was the case. Protracted litigation, and expense incurred, which may be perfectly useless. I cannot distinguish this case from *Gordon v. Gordon*; in both cases the fact of legitimacy was in issue. If the plaintiff had not been legitimate, he had no colour of

¹ 1 Brown, 484.

² 2 M. & K. 409.

title. In *Rhodes v. De Beauvoir*, Tibbutts had a very small interest. If this House had ordered Rhodes to have been examined, and to have excluded him, then that would have been an analogous case. Here is the owner of the estate, having no opportunity of addressing the jury or examining the witnesses.

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LORD CHANCELLOR.—This case involves several points of very considerable importance in the practice of courts of equity, on some of which it will be necessary to come to a decision; and others of which, although they have been discussed at the bar, do not, in the view that I take of this case, call for any opinion.

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The contest between the parties arises upon a will of one Anthony Malone, who, by his will, left his property to his nephew, with a recommendation that he should continue that property in the male line of the family. He, however, assumed that this recommendation from the testator did not bind him to settle the property, so as to continue it in the male line of the family; but he conceived that the will gave him an absolute dominion over the property; and he accordingly, or those who claimed through him, settled the property to the present appellant as tenant for life, with remainder to his first and other sons in tail expectant upon the prior estate for life. The present plaintiff alleges that he is the heir male; that is, the male representative of that Anthony Malone; and, contending that the recommendation in the will of Anthony Malone was obligatory upon Richard Lord Sunderlin, who took under that will he insists that he is now entitled to have the property so settled as

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that he, John Malone, should be entitled to that property in possession.

In stating this he states the mode in which he derives his relationship from that Anthony Malone who made the will. He states that he is the son of Richard Malone, which Richard Malone was the son of Richard, which Richard was one of the brothers of Anthony Malone the testator; and, according to the statement of it, if these facts were verified and established, no doubt the plaintiff would fill the character which he assumes, of the heir male of the family of Anthony Malone.

It is obvious that a suit so constituted embraces two points; one of fact, and the other of law. It is necessary for the plaintiff, claiming as heir male of Anthony Malone, to make out that he does in fact fill that character. Establishing that fact, then a question of law arises, whether the will of Anthony Malone imposed a duty on Lord Sunderlin, who took immediately under the will, so to settle the estate as to make the estate descendible in the male line of the family of Malone.

In cases of that kind where the party assumes a character which he must establish before he can raise the point at law, it is contended on the part of the present appellant that it is the duty of the Court to decide the point of law in the first instance; because, if the point of law be against the plaintiff, then it is immaterial whether he fills the character he assumes or not; and, for this purpose, the case of *Gordon v. Gordon* was principally relied upon; other cases were cited, particularly the case of *Lynn v. Beaver*, which, when looked at, proves to be no authority for that

proposition ; and if the facts of that case were at all similar to the present, it will be found that the question of practice was not the same, because if the plaintiff in that suit had been one of the next of kin, and the sole question had been whether there were not other next of kin, the question would not have been whether the plaintiff filled a situation entitling him to ask for the decision of the Court, but whether there were not other persons equally filling that situation who ought to be before the Court before the question was decided.

It appears, however, from reference to the decision in *Lynn v. Beaver*, that it was decided by the consent and concurrence of all parties, and it is quite clear that it must have been so. It was suggested at the bar that that might be an error in the report ; but it is clear that it was not an error, because it appears that the Master, on the reference to him by the Vice Chancellor, Sir John Leach, found that the plaintiff was not the next of kin. The question was, whether a person of the name of Foster was next of kin ; and it came before Lord Eldon on exceptions to the report. Now, upon the exceptions to the report, Lord Eldon had nothing to decide but whether the Master had come to a right conclusion. It was impossible that Lord Eldon should have come to the decision to which he came, unless he had the consent and concurrence of all parties assuming there was a plaintiff before the Court, who was himself the next of kin. That case, therefore, is no authority to the present purpose.

Other cases have occurred within my own experience, which, however, were not cited at the bar, but in

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which very different questions have been raised, and in which Sir John Leach had adopted a practice which Lord Eldon did not entirely approve of; when cases of this sort, of persons claiming as next of kin, came before the Court, Sir John Leach was in the habit of saying, "I will not decide this question until "I have all the parties before the Court who represent "the next of kin; they may be numerous, or they "may be few." And it was his habit to refer it to the Master in the first instance to ascertain who were the next of kin. Lord Eldon thought that occasioned very considerable expense, which, possibly, at last might be useless; and, therefore, finding that he had a next of kin before the Court who was entitled to fill that character, whether jointly with others or not, he thought it better to decide the question of law between the parties, than first to put them to the expense of deciding who were the next of kin, which might become useless, but in all those cases there was a person filling the character which he assumed.

The case of Gordon v. Gordon is entitled to the highest consideration, because it is a case which Lord Eldon decided; and Lord Eldon's observations, as reported, would imply that he doubted at least whether it might not have been better to have decided upon the other parts of the case before the expense was incurred of an issue as to whether the plaintiff was heir at law or not. I cannot but feel very considerable doubt whether these expressions did fall from Lord Eldon, at least without some qualification which is not to be found in the report; because, when the facts of that case were considered, (and I very well remember the

case at the bar,) it is clear that the Court could not deal with the question without knowing who was the heir at law.

That was a contest between two brothers for the family estates. It related to the legitimacy of the elder one, the younger brother claiming because he alleged the elder brother was illegitimate. In that contest the parties came to an arrangement between themselves, by which they agreed upon a certain division of the property. It afterwards appeared that the younger brother, at the time he got his elder brother to enter into this compromise, upon the supposed doubt whether the marriage had taken place anterior to the birth of the eldest son, was in possession of evidence of the marriage, and that, therefore, had induced his brother to part with this property, to which the elder brother was clearly entitled, upon the supposition of there being a doubt as to the marriage, when, in point of fact, he was in possession of evidence to prove it. The elder brother discovering this, filed his bill to be released from that arrangement, upon the ground that the younger brother, had practised a fraud upon him, and ultimately succeeded. But how could that question have been decided between the parties without the fact being known whether the elder brother was legitimate or illegitimate. The whole foundation of the charge was, that his younger brother knew it, and concealed the fact from him, when he got him to come into the arrangement. It is impossible, therefore, that Lord Eldon could have meant this,—that the Court had decided whether the arrangement was fraudulent or not, without first ascertaining the fact upon which the existence of the alleged fraud rested.

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If these authorities do not lead to a conclusion favourable to the party appealing in this case, there is no authority in his favour. In my experience I have never known a case take the turn which it is alleged this case ought to take. A party comes assuming a certain character, and, founded upon that character, assumes a certain right to the decision of the Court with respect to the property in question. If he has not first established the character he assumes, how can the Court deal with the consequential inference, without knowing whether he is the party that he assumes to be?

Then another observation which arises is, that, generally speaking, it would lead to very evil consequences if this Court were to adopt that course of practice, so as to enable a plaintiff to obtain the decision of the Court on the point of law, without putting him to the proof of the character which he assumes. If the defendants had demurred to the bill, for the purpose of raising the question at law, the fact of the plaintiff being heir male would have been admitted. Any one of the defendants had the power, if they had thought fit to adopt that course, by demurrer, to have admitted, for the purpose of argument, that the plaintiff was,—what he claimed to be,—heir at law, but adding, we demur, because we allege that, even assuming that fact to be so, he has no right to the equity he claims; but they did not think proper so to do; and the plaintiff proceeds with his case before the Court, bound to prove the fact, if he can, by evidence, or, if not, at all events to prove sufficient to entitle him to an opportunity of proving before a jury that he does maintain the character which on the pleadings he has assumed, and on the assumption of which alone he claims to be en-

titled to the equity which he asks the Court to decree in his favour.

Supposing this were merely a matter of discretion, which I admit it may be considered to be, and that there is no positive rule upon the subject,—and I can easily conceive a case occurring in which it would be left to the discretion of the Court either to dismiss the plaintiff's bill upon the facts as they appeared, or to declare that, even assuming the plaintiff to be what he asserted himself to be, still he could have no equity,—then the question is, what is right to be done in that case, assuming that there is a discretion in the Court, either to decide the point of law first, or to put the plaintiff to prove his title first.

The question is raised as to the first order pronounced in this case in the year 1837, by which the Court directed an issue to be tried, whether the plaintiff was the heir male of his father. Now, the form of that has given rise to some singular objections at the bar. At that time the present appellant, who was then the defendant, was a minor. The property which had descended to those claiming through Lord Sunderlin had become vested in two trustees, and under that trust the present appellant was entitled to the estate as tenant for life in remainder. The order for the issue is drawn up by consent, and that order is the first appealed from.

Now, a case has been referred to, for the purpose of shewing that, though an infant is not competent to give consent, that is to say, that it is the duty of those who represent the infant to abstain from consenting, he not being of age to bind himself, or by his own act to dispose of property which may belong to him, yet

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that if an infant does consent he is bound by that consent.

It does not appear to me at all necessary to enter further into that question, because if your Lordships shall be of opinion that the order made in 1837 was a right order to be made, if that consent had not been given, it is quite immaterial to consider whether the infant ought or ought not to be bound by that consent. But there is another reason which makes it immaterial to consider how far that consent was binding upon the infant, which is this: that the Court has thought proper in a subsequent stage of the cause to relieve the infant from the consequences of that consent, and to permit him to put in a new answer, and to go into new evidence. And the Court has ultimately come to a decision, which is the principal subject matter of this appeal, not upon the order for the issue in 1837, but upon the order of 1839, when this appellant had attained his majority, when he had been permitted by the Court to put in a new answer, and to enter into a new defence, and when he was in a situation to ask the Court to come to such an adjudication upon the cause as the Court might think just, without reference to the former proceedings. It appears, therefore, immaterial to consider the order of 1837, except so far as, that order having existed, and the trials having taken place under it, it might operate upon the discretion of the Court, if the Court had a discretion to exercise, in considering what course it ought to adopt when the cause ultimately came before it in 1839.

I should here observe upon a part of the case which was very much pressed at the bar, that the bill ought to have been dismissed on this ground: that the

plaintiff, having alleged himself to be the legitimate son of his father Richard, had then disproved his own legitimacy by the evidence of his mother Bridget, who had been examined to prove his legitimacy, but who actually proved that he was illegitimate, and; upon the depositions as printed for the appellant, no doubt that would be the result of the evidence of Bridget the mother; but those are only partial extracts from the depositions, which ought not to be looked at without looking at other parts of the same depositions; and when the deposition of Bridget the mother is looked at, although there is evidently an inaccuracy in one part of her deposition, in the other it is perfectly plain that she never meant to depose to any facts which constituted proof of the illegitimacy of her son; for Bridget says, that having contracted this marriage, and there being a doubt whether the marriage was valid, upon the ground of doubt whether the husband was a protestant or a catholic, or whether he had been a catholic twelve months previous to the marriage, she states the period at which the child was born, — she states the marriage to have taken place in January 1801, and in another part of her deposition she states the elder brother, Anthony, to have been born in July 1801, which of course would have made him the eldest child of the marriage; but in another part of the deposition she says, in so many words, that the present plaintiff in the suit was the first child born after the marriage in January 1801; and she says, that the other, who would have been the elder brother, born in July 1801, was the child born last preceding the marriage. Therefore there is clearly some misapprehension, either as to date or to some other circumstances. But it is clear

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that, taking the whole of this deposition together, she states and proves, supposing what she says to be true, that the plaintiff was born the first child after the marriage, and consequently, therefore, would be the eldest son and heir of Richard. It is quite clear to me, therefore, that upon such evidence it would have been quite out of the question for the Court of Chancery in Ireland to have dismissed the bill. There may have been ground for doubt, arising from ambiguity or mistake in the evidence, but it certainly was a case which required further investigation before it could be dismissed.

Then the cause proceeded. The issue was tried, and that took place which has been the subject of discussion at the bar, that at the trial, instead of adhering to the marriage as it had been represented to have taken place, other evidence was given which took the other party by surprise, and which was thought a sufficient ground for the Lord Chancellor of Ireland to direct a new trial of that issue. All this time the defendant remained a minor; but he attained his majority in March 1838, and then he applied for leave to put in a new answer, and to enter into a new defence, and leave was given.

Now, that leave having been given, and that course having been adopted, and that not being a subject of complaint at the bar, I abstain from entering into that part of the case, further than to observe, that if the question should arise, how far a party who was an infant during the time when a decree was pronounced, afterwards attaining twenty-one, is entitled to be let into a new defence in a case like this,—if that question should arise, it is one which, I think, will require

serious consideration. There is very great obscurity and a great deal of contradiction in the authorities upon that subject, and it is a proper subject for very serious consideration whenever the question may arise. In this case it was done, and it has not been complained of, and, therefore, your Lordships can come to no decision upon that point.

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That, however, put the plaintiff in this situation, that although an order has been made for an issue, and although proceedings have taken place under that order, no issue has, in fact, been tried, coming to any conclusion as to the character of the plaintiff in this suit. After the defendant had attained twenty-one, he applied to put in a new answer, claiming an interest in this property in common with others, against the claim of the plaintiff. The whole case must depend on the plaintiff's proof of the fact, and the conclusion to be come to upon the law, because if he succeeds in both, of course all those who claim under Lord Sunderlin's will lose their estate; they all stand on Lord Sunderlin's title, and their rights depend upon whether he had or had not a right under that will to dispose of the property as he did; if he had not, and if the plaintiff is the heir male, he is clearly entitled. I am far from assuming that that will be the result of this cause, but I am only stating what is the situation of the parties.

The Court, as I have stated, allowed this defendant to put in a new answer. He made a new defence; and the case came on before the Court of Chancery in Ireland, upon an order of the House, altering, in some respects, the direction for the new trial which the Court of Chancery in Ireland had made; at the

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same time it came on on a new case made by this appellant. I pass over the intermediate order which is the subject of appeal, namely, an order of a prior date, in which the Court merely directed the cause to stand over as a subject matter of appeal, which your Lordships would not be very much disposed to encourage, particularly when, in the course of events, it was perfectly impossible that that appeal should be heard until after the time was expired to which the cause was postponed. I come at once to the last order of November 1839, in which the appellant, relieved from the consequences of the order of 1837, proceeded to make a new defence, and to examine witnesses of his own, and came before the Court of Chancery as upon an original hearing. The cause, however, came on, as far as the other parties were concerned, upon the order of this House directing the Court of Chancery in Ireland to make certain alterations in the order which had been made by that Court.

The appellant says that he considers himself as much entitled as he would have been upon the original hearing to have the decision of the Court upon the construction of the will, before any investigation was directed as to the title which the plaintiff claimed in his character of heir male.

Now, if I am right in assuming that it is a question for the discretion of the Court whether the Court will decide, in the first instance, upon the construction of the will, or will take the course of sending the question of fact to an issue, I will beg your Lordships to consider what was the subject matter then submitted to the discretion of the Court. It was then a matter of more doubt than it could have been supposed to be in

the outset, whether the plaintiff did or did not sustain the character he assumed. He had obtained a verdict; but upon application to the Court a new trial had been directed, and the order directing a new trial had been affirmed by this House. Here then was a question involving the interest of various defendants, some tenants for life, others tenants in remainder, and other persons interested under the title derived from Lord Sunderlin, all of whom had, by the order of 1837, bound themselves to the propriety of the issue trying the plaintiff's title, and who, therefore, could not then dispute it. That order of 1837, at least as to them, was binding. They had been through various proceedings questioning the result of that trial, and they were all parties to the order of this House; at least the defendants in the action were parties to the order of this House directing that the new trial should proceed, with certain modifications, which were introduced into the order. It appears, therefore, that the plaintiff was claiming against various defendants, all of whom, with the exception of the present appellant, had consented and were bound to take the course of having the plaintiff's title in the first instance decided.

Now, if, as I conceive, it would be right in ordinary cases,—I am not at all stating that a case may not arise in which the Court might not be justified in taking the contrary course,—but if in ordinary cases the Court would be right in calling upon the plaintiff to establish the character in which he is suing, how much more so must it be in the exercise of the discretion of the Court when all but one have concurred in the mode of investigating the question between the parties? Now, what would have been the result if a different course

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had been followed? Supposing the Court had attended to the application of the appellant, and had said, quoad the present appellant, we will look at the will, and see whether the plaintiff is entitled to a decision upon that will, assuming that he is what he represents himself to be; if the Court had come to a decision against the plaintiff, the present bill would have been dismissed, quoad the present appellant, but the bill would not have been dismissed against the other defendants. The trial must have gone on if the parties had chosen, and the plaintiff might have got a verdict establishing his title as eldest legitimate son of Richard his father; and, having obtained that, he would have a right to ask the Court to decide upon the construction of the will. The equity of that Court might or might not have been administered by the same individual; but, whether that was so or not, a contrary conclusion might have been come to; and if it had been against the plaintiff he might have come to this bar to have that question decided, whether that construction of the will was right or not; and if this House had been of opinion that the Court below had come to an erroneous conclusion in dismissing the plaintiff's bill, the plaintiff would succeed, but succeed against whom?—against all but the most important party represented at this bar; because if the bill had been dismissed as against all but the present appellant, the present appellant would be no longer a party to the proceeding. That is a position which there would have been great reason to regret if the cause had come to this House for adjudication. If the Court was entitled to consider the expediency of the one course or the other, it does not appear to me that, under the circumstances, there could have been a

doubt as to the proper exercise of the discretion of the Court in proceeding in the course which it had proceeded for several years; namely, ascertaining first the accuracy of the representation of the plaintiff as to the character which he assumed.

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Therefore, as to the substance of the order of 1839, I have no hesitation in stating, that in my opinion that order was correct. Some objections have been made as to the form of the order, which, however, I apprehend to be equally untenable with those to which I have adverted. One objection is, that the form in which the question of right was directed to be tried was not the form in which a matter of that sort could be investigated. The plaintiff claims as heir male; the issue is, whether he be or be not heir male. He endeavours to make out that fact by showing that he is the eldest son after the marriage. No doubt that, if established, would constitute his title. But then it is said that this may let in a title which has accrued subsequently to the institution of the suit. The issue was directed to try the real point, the real point being the character of the heir male. The issue, therefore, being directed to try that question, the rest are merely the means by which the character so stated may be established.

Then it is said, that the issue is, not to try whether he is heir male, but to try whether he is heir; and it is wrong, because it ought to have been to try whether he is heir male; that is to say, the party claiming as heir male, namely, as eldest son of his father, that it is too vague and too ambiguous to try whether he is heir, but that it ought to have been, whether he is heir male,—whether he is the eldest son. The result of

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the investigation under the issue as directed I apprehend would be quite satisfactory as to whether he was heir male or not; but that is seriously put forward as one of the grounds of objection.

Another ground, of more importance, no doubt, but which is equally untenable, regard being had to the practice of courts of equity upon this subject, is, that the issue which has been tried is an issue which binds him, but to which he is not, strictly speaking, a party. That is the ordinary course in which issues are directed by a court of equity to be tried, and of necessity it is so, because questions arise which affect the rights of a great variety of parties who may be all interested in the question of the construction of the will; but because an issue is directed all the parties cannot be defendants. Who is to conduct the defence? Cases have occurred, and some in which I have myself directed issues, where persons were interested in the same estate, and interested in the same question, and where there appeared no means of selecting, between the one and the other, which should be the party to conduct the defence; and I remember one case particularly, of very great importance, in which it was so equally balanced between the two that I thought it right to give them an equal chance, and, therefore, I made them both parties to the issue, and put it to them to choose among themselves who should be intrusted with the defence, and I think that succeeded; they did select those who should be intrusted with the defence, without being bound by it. But it frequently happens, in a case of that sort, that a great number of persons are interested; there may be twenty or thirty persons interested in the result of the proceeding. Are they all

to be defendants, and all to have an equal title to conduct the defence? That would be inconvenient, and would be so impracticable, that it is not the course of the Court. The Court selects those persons whom it thinks the most proper to be selected for that purpose, and, if the case requires it, permits the other parties to attend, to see that the case is properly conducted, and that justice is done. Here the Court very properly selected those individuals who represented all the interests of those claiming under the will of Lord Sunderlin; it selected the trustees, whom the devisees, the owners of the estates, had selected to conduct the defence; and the order of 1839 gave to the present appellant, together with others, a right to attend the trial, to see whether his trustees properly conducted the defence.

That being the course of the proceeding, and that being the form of this issue, that disposes of several other minor points which were urged. The parties to the action at law are, of course, claiming against all the trustees, and representing all under an adverse title; if so, the evidence is to be regulated in the same way. Then there is no objection to the evidence of the persons who have been examined, and who may have died since the former issue, and prior to the trial of the issue now directed, being laid before the jury, by the best means the Court has of knowing what is said, namely, by the notes of the Judge being read to the jury. Courts of equity are in the habit, for the purpose of saving expense, of giving directions as to the mode of trial, which might not be correct unless such directions were given; for instance, in directing proceedings to be laid before a jury, it dispenses with the

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formal proof of facts established before the court of equity ; it saves the party the expense of going through that formal proof, and directs certain evidence to be received before the jury.

Then there are other objections also founded upon this ; namely, that the present appellant, the defendant, is affected by evidence which might or might not have been false. But when your Lordships consider that the point which has been tried is the same point, and between the same parties, in which the Court came to this conclusion on the original hearing, I have no hesitation in saying I think the Court came to a right conclusion, and that, if the hearing of 1839 had been the first hearing, and no order had been made in 1837, and no order in 1838, and no intermediate trial, it would have equally been so. So much difficulty has arisen in ascertaining the truth, that, in my opinion, it was the right course for the Court to pursue, to proceed, by means of an issue, to establish the fact in the first instance, so as to enable the Court then to act upon the fact, when found. All these objections having failed, I submit to your Lordships the proper course for this House will be to dismiss the appeal, with costs.

Orders affirmed, and appeal dismissed with costs.

[8th, 10th, and 14th June 1841.]

(On a Writ of Error from the Court of Exchequer
Chamber.)

EDWARD GILL FLIGHT, THOMAS FLIGHT, and
JOHN KNIGHT, Plaintiffs in Error.

JOHN THOMAS, Defendant in Error.

Under 2 & 3 Will. IV. cap. 71. sects. 3. & 4.¹, a party is entitled to maintain an action for an obstruction to the enjoyment of light and air, though the twenty years enjoyment has been obstructed by an interruption which was made for thirty-three days previous to the expiration of the twenty years. The interruption, in order to prevent an action being maintained, must be an interruption acquiesced in for one year after the party interrupted shall have had notice thereof.

¹ By the third section it is enacted, that when the access and use of light to and for any dwelling house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

By the fourth section it is enacted, that each of the respective periods of years herein-before mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question; and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.

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Statement.

THIS was an action on the case, brought by Thomas, the defendant in error, against Flight and others, the plaintiffs in error, for raising a wall against a window in a house occupied by Thomas, whereby the light and air were prevented from entering through the window into the house.

The defendants pleaded, that at the time of their raising the wall the window had existed and been enjoyed for nineteen years and part of another year only; and that the wall continued from the time of the raising thereof continually until the commencement of the suit, and until the time of pleading; and that the period of one year did not elapse from the said time of the raising of the wall, before or until the commencement of the suit; and that at the time of raising of the wall, to wit, on the 1st day of January, A. D. 1832, and from the time of such raising continually until the commencement of the suit, Thomas had notice that the defendants had raised the wall, and thereby prevented the light and air from entering the house through the window, with a traverse, that at the time of erecting the said wall the light and air ought to have entered in the manner and form alleged by Thomas.

Knight pleaded to both these counts, in the same manner as the Flights.

At the trial before Parke, B., at the Dorchester summer assizes, 1838, it was proved, that at the time of the raising the wall by the defendants the part of the window mentioned in the plea had been enjoyed for the space of nineteen years and 330 days; that the space of one year had not elapsed from the time of the raising of the wall before the commencement of the

suit ; that at the time of the commencement of the suit the window had been enjoyed for the full space of twenty years, without any interruption, save and except the interruption mentioned ; and that the plaintiff had notice of the wall being raised, whereby the light and air were prevented entering the house. The Judge, upon these facts, directed the jury to find (who found) a verdict for the plaintiff. The plaintiffs tendered a bill of exceptions to the Judge, who, having sealed the same, and judgment being entered upon the verdict in the Queen's Bench, a writ of error was brought in the Exchequer Chamber, where, upon argument, the judgment of the Court below was affirmed.

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Upon this judgment of the Court of Exchequer Chamber a writ of error was brought.

Sir William Follett and Serjeant Manning for the Plaintiffs in Error.—The window had only existed nineteen years and a fraction when the defendants raised the wall against the window. The question is, whether the plaintiffs can maintain an action. By the old law they could not have maintained an action unless there had been a use of twenty years, whence a presumption would have arisen of a grant. The act was introduced by Lord Tenterden, in order to give facilities in the pleadings and proof, but not to alter the period from which a presumption of the right would arise. The consequence of holding that this action can be maintained would be, that an act, legal in the first instance, would afterwards become illegal. If the owner of the window had thrown down the wall he would have

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been liable to an action; yet, after the twenty years had expired, he might have brought an action against the owner of the wall, and both actions might come on to be tried before the same Judge, at the same assizes. An act lawful in its origin cannot be made unlawful by any thing that afterwards occurs. Mr. Baron Parke says, "he should be glad if the absurdity arising from the clauses could be got rid of." In order to get rid of absurd consequences, the act of parliament ought to have been construed by the Judges in a different way. There is a variety of cases where a literal construction would work a wrong, where the Courts, contrary to the literal construction, have given an interpretation which would work no wrong. The intent of the act of parliament is to be regarded.¹

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Mr. Erle for the Defendant in Error.—The title of the defendant to the enjoyment of light depends upon the construction of the act of parliament. If he has been in possession of the window without such an interruption as the act contemplates he is clearly entitled to the enjoyment of it; but the interruption, as defined by the act of parliament, must be for one year during the currency of the twenty years, and no such interruption has in the present case existed. The words of the act are perfectly clear and unambiguous, and, whatever may be the consequences, courts give effect to clear and unambiguous words. Every court has sanctioned this construction. *Wright v. Williams*², *Jones v.*

¹ Co. 2 Inst. 112; Co. Litt. 360 a.; Plowden, 88, 298.

² 1 Mee & W. 77;

Price¹, *Tickle v. Brown*.² There was an inchoate right for maintaining an action for building up the wall during the twentieth year, and there are many instances of acts legal in their commencement becoming illegal. Insolvent pays a brother's debt, but if within three months he takes the benefit of the act it is an illegal payment, 1 & 2 Vict. c. 110. sec. 59. So, in the case of bankruptcy, acts legal in their commencement may become illegal by relation back.

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Sir William Follett in reply.—If an interruption of a day had taken place before the act the twenty years must be reckoned from that interruption. Does the act mean that a person who has never enjoyed the right for twenty years can maintain an action to enforce his right? Such a construction would be in direct violation of the sixth section of the act: “that, in the cases “ mentioned in the act, no presumption shall be allowed “ in favour of any claim upon proof of the enjoyment “ of the right for a less period than the period mentioned in the act.” It is said in bankruptcy, that an act legal in its commencement may afterwards become illegal; in that case there is an alteration in the circumstances of the party; here the parties stand in the same relation, and that which was legal before is now illegal. In all future cases nineteen years and a day will be sufficient to constitute a right. In rights of way and rights of water, if the judgment below be confirmed, the period which constitutes the right will be altered, and the whole term of the law unsettled.

Appellant's
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¹ 3 Bingham's New Cases, 52.

² 4 Adolphus & Ellis, 369.

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14th June 1841.

LORD CHANCELLOR.—The facts of this case, as stated in the bill of exceptions, are, that a window having been created, and having been enjoyed for nearly twenty years, in the course of the last year, before the expiration of the twenty years, the defendant erected a wall, which the plaintiff complains obstructed the light and air of that window. Upon these facts being proved, and error assigned under the direction of the learned Judge who presided at the trial, as the bill of exceptions expresses it, “the said Baron did
“ then and there declare and deliver his opinion to
“ the jury that the several matters so shewn and
“ proved to the said jury were sufficient, and ought
“ to be allowed as decisive evidence, that the light and
“ air ought to have entered through the said front of
“ the same window in manner and form as the said
“ plaintiff had in his said replication to those pleas
“ respectively in that behalf alleged, and to entitle the
“ said plaintiff to a verdict upon the issues raised in
“ his replication to those pleas respectively, and with
“ that direction left the same to the said jury.”

This turns upon two sections of the act of the 2d and 3d Will. IV. chap. 71., by the third of which sections it is enacted, “that when the access and use
“ of light to and for any dwelling house, workshop,
“ or other building shall have been actually enjoyed
“ therewith for the full period of twenty years without
“ interruption, the right thereto shall be deemed abso-
“ lute and indefeasible, any local usage or custom to
“ the contrary notwithstanding.” By the next section it is provided, “that each of the respective periods of
“ years herein-before mentioned shall be deemed and

“ taken to be the period next before some suit or
 “ action, wherein the claim or matter to which such
 “ period may relate shall have been or shall be brought
 “ into question, and that no act or other matter shall
 “ be deemed to be an interruption, within the meaning
 “ of this statute, unless the same shall have been or
 “ shall be submitted to or acquiesced in for one year
 “ after the party interrupted shall have had or shall
 “ have notice thereof, and of the person making or
 “ authorizing the same to be made.”

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These being the words of the act of parliament, and the fact in this case being, that the twenty years enjoyment of the window expired before the year expired after the erection of the wall which occasioned the interruption, so that, in point of fact, when the suit had commenced twenty years had elapsed from the time when the window was first opened, and one year had not elapsed since the time when the obstruction was erected, the question is, whether the learned Baron was correct in stating to the jury, that under the provisions of this act it gave the plaintiff a right of action.

The argument at the bar principally rested upon this, that there had not been twenty years enjoyment. That there had not been a year's interruption was clear from the facts stated upon the bill of exceptions; but the ground of the objection to the direction of the learned Judge was, that there had not been twenty years enjoyment. Now, in point of fact, there is no doubt that there was not twenty years enjoyment, according to the ordinary meaning and usage of that term, but whether there had or had not been twenty years enjoyment within the meaning of the act, because

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whatever term the act uses, if it explains the meaning of that term, it is quite immaterial whether the word may or may not be used in any other sense, where it is not explained what the meaning of the term is. Now, as I read these two sections, the meaning is, that there must be twenty years from the commencement of the right to enjoyment to the commencement of the suit, and no interruption shall be considered as an interruption within the meaning of the act,—that is to say, for the purpose of interfering with the twenty years,—unless that interruption shall have lasted one year. The act, therefore, explains what it means by enjoyment without an interruption of one year's duration. Twenty years must elapse, but no interruption shall be considered as preventing the twenty years from running unless that interruption has a duration of one year.

Now, I think it was hardly disputed (although when it was put to the learned counsel an attempt was made to show a distinction) that, within the terms of the act, if an interruption of any duration had taken place, and had ceased during the running of the twenty years, so that at the expiration of the twenty years there was no obstruction that would prevent the action being brought at the expiration of the twenty years, it must be so within the terms of the act, because the objection is, not that there is not twenty years enjoyment, but that there is not twenty years enjoyment without interruption, and whether that interruption be in the middle or be at the end of the term cannot, within the meaning of this clause, create any difference in the result.

That would be the construction which, I should think, would be the obvious construction of these two clauses, if there had been no decision upon the subject. It does, however, so happen that in all the courts at Westminster this question has arisen more or less directly.

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In the case of *Jones v. Price* the real point decided was, that the twenty years must be pleaded as being next before the commencement of the suit. The right was there laid, not as next before the obstruction created, but next before the commencement of the suit. Now, if the right mode of pleading be next before the commencement of the suit, that of course implies that the plea would have been bad if it had been next before the injury complained of.

In *Richards v. Fry*, in 7 Adolphus and Ellis, page 704, it was held, that the laying the term of enjoyment before the act complained of was bad, and that it ought to have been next before the commencement of the suit. There is also the case of *Wright v. Williams*, and the case of *Lawson v. Langley*, in 4 Adolphus and Ellis, page 890; which cases prove this,—not only that it is good to lay the right twenty years before the commencement of the suit, but that it is bad if it is not so laid. It is bad if it is laid next before the injury complained of. Those cases decide that, according to the true construction of the act, the twenty years is to be reckoned from the date of the commencement of the right claimed until the commencement of the suit.

Then we have only to put a construction on the words of the act relating to the interruption. The words of the act are positive,—“that no interruption

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" for less than one year shall be reckoned for the purpose of this act,"—the purpose of the act being to give twenty years enjoyment the effect of absolute right,—that no interruption of the enjoyment of that right for less than one year shall have effect for the purposes of the act.

Under these circumstances I think there cannot be a doubt that the construction put upon this act by the Court below was a correct construction, and I shall move your Lordships to affirm the judgment, with costs.

Ld. Brougham's
Speech.

LORD BROUGHAM.—I entirely agree with my noble and learned friend, that the learned Baron to whose direction the exception was taken, which was afterwards brought by writ of error to the Exchequer Chamber, and subsequently brought from the Exchequer Chamber before this House, was right. I cannot get over the words of the act in the fourth section, with respect to the commencement of the twenty years being next before the action brought, and the proviso with respect to an interruption for one year's duration. The arguments which were used to show, not merely the inconvenient consequences, but the absurd consequences, that might result, I do not think sufficient to counter-vail the plain and obvious meaning of the words. I cannot get rid of those words; and the absurdity imputed in the argument to that construction does not appear to me sufficient to warrant a departure from that plain construction. Then, as my noble and learned friend has remarked, though the precise case may not have arisen, yet, as far as the cases have approached to the present case, they are clearly in

favour of this construction. As to the doubt said to be thrown out with reference to one of those cases, namely, *Wright v. Williams*, I think it is not necessary to say more than to observe, that I, for one, certainly do not partake of that doubt. I agree, therefore, with my noble and learned friend, that the judgment of the Court of Exchequer Chamber must be affirmed.

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Affirmed with costs.

[10th, 14th, 15th, and 18th June 1841.]

(From the Court of Chancery.)

JAMES KAY, Appellant.

JOHN MARSHALL the elder, JAMES GARTH MARSHALL,
and HENRY COWPER MARSHALL, Respondents.

A patent was taken out for new and improved machinery for spinning flax. The improvement consisted in spinning flax at a shorter reach than it had been hitherto spun, by fixing the rollers at two inches and a half distance from each other; but spinning machines having before been used for varying the distances between the rollers, according to the length of the staple or fibre to be spun, though flax had never been spun at so short a distance,—Held, that the patentee had failed in his claim to a new invention, and that his patent was void.

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IN 1835 a bill was filed by the appellant against the respondents, stating that in the year 1824 the appellant, having invented new and improved machinery for preparing and spinning flax, hemp, and other fibrous substances by power, obtained letters patent, dated the 26th July 1825, granting to him, his executors, administrators, and assigns, the sole and exclusive right and privilege of making, using, exercising, and vending his invention in Great Britain and Ireland for the period of fourteen years. That by a specification

under his hand and seal, dated the 26th January 1826, and duly enrolled, after describing the nature of his invention and its several parts, and in what manner the same was to be performed, he declared that what he claimed as his invention in respect of new machinery for preparing flax, hemp, and other fibrous substances were the macerating vessels marked (B) in the drawing annexed to the specification, and the trough of water marked (C) in such drawing; and that what he claimed as his invention in respect of improved machinery for spinning flax, hemp, and other fibrous substances was the wooden or other trough marked (D) in the drawing for holding the rovings when taken from the macerating vessels, and the placing of the retaining rollers (cc) and the drawing rollers (cc) nearer to each other than they had ever before been placed, say within two inches and a half of each other, for the purpose aforesaid.

The bill stated, that, in the process of spinning flax by power, the skein of flax commonly called a roving was drawn out or elongated, immediately before its being spun, by means of drawing and retaining rollers, the drawing rollers moving at a greater velocity than the retaining rollers; and that, in the machinery for spinning flax by power commonly in use prior to the appellant's said invention, the drawing and retaining rollers were placed at a distance of from twelve to twenty inches, or thereabouts, from each other, such distance being regulated by the length of the staple or fibre of the flax, and that such machinery was not adapted to the spinning of flax in a wet or macerated state, by reason that wet or macerated flax could not, when the rollers were placed at the distance of the

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ordinary length of the staple, be drawn out or elongated to the requisite degree of fineness, without slipping or breaking; that the appellant, after many experiments, discovered that by a new combination of the drawing and retaining rollers, that is to say, by placing the drawing rollers at a distance of two inches and a half only from the retaining rollers, the skein of flax or roving might be drawn out and spun in a wet or macerated state, and that when drawn out and spun in such prepared state a thread of a much finer and stronger texture could be produced than could be produced from the skein or roving drawn and spun with the machinery and according to the method in use prior to the appellant's said invention.

The bill then stated, that subsequently to the date of the appellant's letters patent the process of macerating flax in the mode described in his specification had become altogether, or in a considerable degree, unnecessary, the skein or thread of flax being, by reason of the improved preparation thereof, rendered capable of being sufficiently wetted for drawing and spinning by being made merely to pass through a trough of water previously to being drawn out and spun, which prior to such improved mode of preparation was not the case.

The bill then stated, that the appellant's invention of machinery for spinning flax by means of placing the drawing rollers within the said short distance of the retaining rollers was a new invention, and one of great public utility, but that nevertheless the defendants had, in violation of his exclusive right to the benefit of his invention, caused great quantities of new and improved machinery for spinning flax to be con-

structed upon the principle of the appellant's invention, and had used and continued to use the same in their spinning mills at Leeds and elsewhere in the county of York, and also at Shrewsbury, and elsewhere in England.

The bill prayed that the defendants might be restrained from all further infringement of the appellant's patent, and that they might account for the profits derived from the use of the appellant's invention in the spinning of flax.

The respondents, after the time for demurring had expired, obtained leave of the Court to put in, and they accordingly put in, a general demurrer to the bill, which came on to be argued, on the 2d June 1835, before his Honour the Vice Chancellor, when it was ordered that the demurrer should stand over, with liberty to the appellant to bring such action as he might be advised, but which order was afterwards discharged by the Lord Chancellor, and the demurrer overruled.

The respondents, upon an application to the Master of the Rolls for leave to file two pleas to the bill, which was granted, put in two pleas to the bill, and an answer in support thereof, whereby the respondents pleaded,—

First, the appellant had not before and at the time of the making of the letters patent in the bill mentioned found out and invented any new and improved machinery, as in the bill and the letters patent and specification was alleged :

Secondly, the alleged invention of the appellant, as in the said bill and letters patent and specification mentioned and described, was not before and at the time of the making of the said letters patent of much or any public benefit and utility, as in the said bill and letters patent was alleged.

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On the 2d June 1836, on the hearing of the cause, the Master of the Rolls ordered that the parties should proceed to a trial at law, at the then next summer assizes for the county of York, upon the following issues :—

First, whether the appellant had before and at the time of the making of the letters patent in the bill mentioned found out and invented any new machinery, as in the said bill and letters patent and specification was alleged :

Second, whether the alleged invention of the appellant, as in the bill and letters patent and specification mentioned and described, was before and at the time of the making of the said letters patent of much or any public benefit and utility, as in the said bill and the said letters patent was alleged.

And the plaintiff and defendants there were to be respectively plaintiff and defendants at law, and the Judge who tried the issues was to be at liberty to indorse special matters on the postea, as he should think fit.

The issues accordingly came on to be tried at the summer assizes for the county of York in the year 1836, before Parke, B., and a verdict was found for the appellant on both issues, with the following indorsement on the postea:—" That, before the granting of the patent, " flax, hemp, and other fibrous substances were spun " with machines with slides, by which the reach was " varied according to the length of the staple or fibre of " the article to be spun, and that that has been a fun- " damental principle of dry-spinning known and used " before the granting of the patent; the reach hav- " ing varied in cotton-spinning between seven-eighths " of an inch to one inch and a quarter; in flax or line " spinning, from fourteen to thirty-six inches; tow

“ spinning from four to nine inches ; worsted spinning
 “ from five to fourteen inches. But before the granting
 “ of the patent it was not known that flax could be
 “ spun by means of maceration, as having a short fibre,
 “ at a ratch of two inches and a half, or about those
 “ limits. But before that time Horace Hall had taken
 “ out a patent for, &c., with a specification as annexed ;
 “ and the machines manufactured according to that
 “ patent were constructed with the reach of four inches
 “ and three quarters, and before that time the applica-
 “ tion of moisture in spinning flax for the purpose of
 “ separating the fibres and reducing the length of the
 “ staple had been used under Hall’s patent.”

The Master of the Rolls, on a motion by the respondents, that a new trial might be directed of the issues, or in case he should not think fit to direct such new trial, then that a case might be directed to be made for the opinion of the Judges of the Court of Common Pleas, on the 31st January 1837, ordered, that a case be made for the opinion of the Judges of the Court of Common Pleas.

The case stated the substance of the letters patent and specification, the order of the Master of the Rolls directing the issues, the issues so directed, the verdict found on those issues, and the indorsement on the postea to the effect above mentioned ; that the letters patent mentioned in the said indorsement as having been granted to Horace Hall, with the specification thereto belonging, should be considered part of the case ; and that the finding of the jury on the issues and the facts, as found and indorsed on the postea, were to be assumed to be true. The question for the opinion of the Court was, whether the appellant’s patent was valid in point of law ?

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Upon this case the Judges of the Court of Common Pleas having certified that they were of opinion that the appellant's patent was not valid in point of law, the cause came on to be heard on further directions before the Master of the Rolls on the 27th May 1839; and on the 16th July 1839 it was ordered that the appellant's bill should stand dismissed out of Court, with costs both at law and in equity, except the costs of the issues, such costs to be taxed by the Master.

Since the institution of the suit the patent had been extended for a term of three years beyond the period for which it was originally granted, by order of Her Majesty in council, bearing date the 13th day of June 1839.

Against the said orders of the 31st January 1837 and the 16th July 1839 the appellant appealed.

Appellant's
Argument.

Sir F. Pollock and Mr. Kindersley for the Appellant.—Upon the two issues, whether the appellant has invented new machinery, and whether the invention was of public utility, the jury has found for the appellant. Whether there was an insufficient specification, the ground upon which the Court of Common Pleas proceeded, was not involved in the issue between the parties. It is admitted that the macerating process is new; if any part of this process of spinning flax is new the plea is bad. The spinning of fine flax had never been brought to perfection before the appellant took out his patent, nor had flax ever before been spun at so short a reach. The appellant does not claim to spin flax alone, or to macerate it alone; his invention is, to moisten the flax, and spin it, by machinery. It is said that the machinery is

not new; but it has been applied in a new manner, and the inventor of a new application of old materials is entitled to claim a patent for a new invention.

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Mr. Pemberton and Sir William Follett for the Respondents.—The plea denies, as it is alleged in the pleadings, that new machinery has been found out. What is claimed as new machinery is not new machinery. Any machinery means any machinery mentioned in the bill and specification. In what respect can it be said that there is new machinery? Is the placing the rollers nearer new machinery? In dry spinning the rollers have been placed nearer in cotton than the appellant has placed them in spinning flax. The rollers have always varied in distance according to the length of the fibre to be spun. Supposing a natural substance to be found out which could be spun at a distance of one to three inches, could not the rollers be varied to that distance without violating Kay's patent? But, granting that the macerating of flax is new, then the patent ought to have been taken out for macerating the flax, and not for two processes; the one for macerating the flax, and the other for spinning flax when so prepared. If part of the invention fails the whole is void. The appellant does not by his bill rely upon the macerating process, which he alleges is now become useless, but upon the improved machinery, which, not being new, cannot be the subject of a patent.

Sir Frederick Follock in reply.—The jury has found that the machine is new, and it is not competent for the Court to say it is not new. Cotton cannot be spun by a flax machine. It is a new and improved machine for

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preparing and spinning flax. The same machinery may be employed for any other purpose, except macerated flax.

18th June 1841.

LORD CHANCELLOR.—In this case the plaintiff, Mr. Kay, complains of the defendants having invaded his patent; and the course taken below was certainly not of very ordinary occurrence, as your Lordships will see, when I call your attention to the mode in which the case was disposed of in the course of the proceedings. The bill sets forth the patent and the specification, which states that the invention was in respect of new machinery for preparing and spinning flax, hemp, and other fibrous substances; and then it states, that the first process, namely, for macerating the flax, had, to a considerable degree, become unnecessary. It then complains of what the defendants have done,—not as at all interfering with his, the plaintiff's, patent, as relative to the preparing flax for spinning, but as having invaded his patent, so far as it was an improved machinery for drawing and spinning flax,—stating, that that continued to be used, and was a mode very generally adopted.

That is the complaint made by the bill to which the defendants pleaded; and by the plea they raised two objections to the plaintiff's title. The first objection was, "That the plaintiff had not, before and at
" the time of making the letters patent in the bill men-
" tioned, found out and invented any new and improved
" machinery, as in the said bill and the letters patent
" and specification was alleged." That objection, therefore, was, that the patent was bad, because the

invention contained in the letters patent and specification was not new,—that there was not any novelty in it,—alluding to the rule of law, that if any part of that which is claimed as an invention, and as new, was not in fact new, the patent would be bad. First of all, upon the construction of this plea, I cannot entertain a doubt but that the terms “any new and improved machinery, as in the said bill and the letters patent and specification was alleged,” are to be construed as meaning any such machinery as is there alleged, and in respect of which the patent is claimed. But I apprehend that that does not now come before your Lordships for decision.

The two pleas having been set down for argument an issue was directed, which was afterwards tried. No judgment was pronounced upon the validity of the plea; the parties, though it is not expressed perhaps in terms in the order, thought it more expedient to proceed to the trial of the truth of the plea, not asking or obtaining the judgment of the Court as to the legality of the plea, and as to how far the plea raised the important fact. They proceeded accordingly to trial, and upon the trial the jury found in favour of the novelty, and in favour of the usefulness; but there was an indorsement upon the postea, which stated, that there had been, “before the granting of the patent, flax, hemp, and other fibrous substances spun with machines with slides, by which the reach was varied according to the length of the staple or fibre of the article to be spun, and that that has been a fundamental principle of dry spinning known and used before the granting of the patent; the reach having varied in cotton spinning between seven eighths of an

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“ inch to one inch and a quarter; in flax or line spinning, from fourteen to thirty-six inches; tow spinning, from four to nine inches; worsted spinning, from five to fourteen inches. But before the granting of the patent it was not known that flax could be spun by means of maceration, as having a short fibre at a reach of two inches and a half, or about those limits. But before that time Horace Hall had taken out a patent for, &c., with a specification as annexed, and the machines manufactured according to that patent were constructed with the reach of four inches and three quarters.”

Now that indorsement, which is to be taken as part of the information which the Court is to act upon, as ascertained before the jury, states the various distances at which the rollers were placed in the ordinary spinning machines, and states, as a fact, which cannot now be in dispute, “that, before the granting of the patent, flax, hemp, and other fibrous substances were spun with machines with slides, by which the reach was varied according to the length of the staple or fibre of the article to be spun.” We have it, therefore, as a fact now to be assumed as true, that spinning machines were constructed with rollers the distances between which varied according to the substance to be spun.

Now all the variation which the plaintiff introduced into the ordinary spinning machine, which he claims as his invention, is fixing the rollers at two inches and a half distance from each other, and that he states is such an improvement to the ordinary spinning machine as entitles him to be protected from the rest of the world against their using spinning machines with the rollers

at that distance. It is not, as was argued at the bar, one invention, namely, the macerating of flax, and using flax so macerated, with a particular machine. The earlier part of the invention he not only does not claim as against the defendants, but does not claim of the defendants having used it, and in point of fact it is quite clear that he has not adopted that mode. Another mode has been adopted of macerating the flax, and the flax so macerated by another process has been used in a machine with the rollers at two inches and a half distance. If the patent be good, so far as the spinning machine is concerned, that is to say, if the plaintiff has a right to tell the defendants and all the rest of the world that they shall not use the common spinning machine with rollers at two inches and a half distance, then the existence of the patent deprives the defendants, and all the rest of the world, of the right of using the ordinary spinning machine in the form in which they had a right to use it before the patent was granted. Now that is not the object of the patent. If he has discovered any means of using the machine which the world had not known before, the benefit of that he has a right to secure to himself by means of a patent; but if this mode of using the spinning machine was known before (and the endorsement upon the postea states that it was known before) then the plaintiff cannot deprive them of having the benefit of that which they enjoyed before; the indorsement upon the postea stating, that the rollers had been used at a variety of distances, not precisely specifying two inches and a half, but stating that the distances had been made to vary according to the length of the fibre to be spun, appears

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to me to establish a fact which, of itself, is conclusive against the plaintiff.

Some question was raised at the bar, as to whether the effect of this maceration was to shorten the fibre. There is no very distinct evidence upon the subject; but, upon referring to what has taken place in the Court below, it does not appear that any doubt existed as to that; that the effect of maceration was to detach one fibre from another,—the substance consisting of a variety of fibres of the length of two inches and a half each, when combined they constituted a compound fibre of considerable length, but when detached by means of maceration, by the application of moisture, then each individual fibre was reduced to the length of two inches and a half. It does not appear to me, however, that this case can depend upon that circumstance, because the real use of the spinning machine before this process of maceration was introduced was this,—a machine for spinning with rollers at any distance, at the option of the parties using it, or according to the nature of the substance to be spun,—and any substance might be spun that was capable of being so spun, with rollers of two inches and a half distance, because the fibre was of that length, or for any other reason; that is quite immaterial. The question is, whether it is an innovation the placing the rollers at two inches and a half distance from each other? But by the indorsement upon the postea we are told, that the distance between the rollers varied according to the length of the fibre of the article to be spun.

Under these circumstances, the case being now reduced simply to the question, whether the construction

proposed by the patent is an improvement of the spinning machine, it appears to me that the judgment of the Court of Common Pleas is well founded, and that such a patent is not valid in point of law.

Some objection was made as to the course which was adopted in granting the case; that is to say, the terms in which the case was sent. There is no question that the parties below were willing to adopt the terms proposed, in order to put an end to the litigation, and that the Court, therefore, sent a case embodying the rights of parties, namely, the validity of the patent, confined to the particular point raised. That of itself would be an answer to the objections now made to the terms in which the case was sent, because this House will not permit parties upon appeal to raise a question which they did not think proper to raise and upon which they did not obtain the judgment of the Court below.

But, even independently of that consideration, although the terms of the question for the Court of Common Law are the validity of the patent, you must take the whole case together; you have there the facts stated which raise the objections to the validity of the patent which are contained in the pleas, and these facts are confined to the question of novelty and the question of usefulness. In point of fact, therefore, although the terms in which the question is couched are larger than the plea, it is the very same question that was raised before the Master of the Rolls, and that was the question upon which the judgment of the Court of Common Pleas was pronounced; and it does nothing more than establish this proposition, that the objection taken to

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the patent, as not being new, and nothing useful, is a good objection, and that the patentee has failed to show that that for which he has claimed a patent was a new invention.

LORD BROUGHAM.—I entirely agree with my noble and learned friend.

Judgment affirmed with costs.

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COMMISSIONERS OF TAXES.

1. Payment of money received by a collector for a given year, to the account of a former year, is a breach of the condition of a bond for due payment. It is not competent for a court of error to award a repleader.
2. To an action on a bond by the commissioners of taxes against the sureties the defendant by plea states, that the collector had lands and goods of which the plaintiffs had notice; the replication asserts that he had no lands and goods of which they had notice; and the rejoinder asserts that the collector had lands and goods which might have been sold, but omits to put in issue that the commissioners had notice, whereupon issue is joined. The jury having found that the collector had lands and goods,—Held, that the issue being found for the defendant, he was entitled to a verdict, but not to judgment, inasmuch as the issue, if it were any issue at all, was immaterial or insufficient; and that judgment could not be entered for the plaintiff non obstante veredicto, as the rejoinder could not be taken to be an implied confession that the commissioners had no notice, and the plea, if true, would form a good defence to the action. Nor, taking into consideration the other pleas, could judgment be entered up for the plaintiff on the whole record, as the plea, that the collector had lands of which the commissioners had notice, not being put in issue by the pleadings, nor disproved, remains a good bar to the action. *Gwynne v. Burnell*, - - - page 342

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COMPOSITION. See *Tithes*.

CONFIRMATION.

Sir William Ryves De Montmorency devises his real estate to Harvey Devereux in trust to permit his natural son William De Montmorency to enjoy the same for ever, subject to his debts, and bequeaths his personal estate to William De Montmorency, and appoints Harvey Devereux, who had for fifteen years before his death been his land agent and general manager of his affairs, the executor of his will. On the 16th April 1829, two days after the death of the testator, William De Montmorency expresses his determination to give an estate at Cool-drina, devised to him by the testator, to Harvey Devereux, and to appoint him land agent and receiver of his estates. On the 18th of the same April Harvey Devereux brings to William De Montmorency deeds of lease and release, dated the 17th and 18th April 1829, ready drawn and prepared, whereby William De Montmorency, in consideration of Harvey Devereux's faithful services, and in discharge of all accounts between Sir William De Montmorency and Harvey Devereux, some of them being unsettled, conveys the estate at Cooldrina to Harvey Devereux in fee, and on the same day, by letter, appoints him the agent of his estates, at a salary of 200*l.* a year, and promises, in case of his removing him without sufficient cause, to give him the same salary. Shortly after the death of the testator a relation of the testator's declared that he intended, as heir-at-law, to lay claim to the testator's estates. On the 2d of June 1829 Harvey Devereux proved the will of the testator at Dublin, and on his return home from thence, accompanied by William De Montmorency, made a speech to the tenants of the estates, stating that he was in possession of a secret which might defeat William De Montmorency's title to his estates, but that it should remain with him; and if any one claiming a right to the estates should go to law he would defeat him, as he was always successful in any cases in which he was concerned:—Held, that if the transaction had been complained of in reasonable time it would have been set aside by a court of equity, but inasmuch as in October 1830, upon the investigation of the accounts between William De Montmorency and Harvey Devereux by their respective solicitors, the deeds of 1829 were distinctly called to the attention of William De Montmorency's solicitors, and were adopted by them in the settlement of those accounts, and inasmuch as in December 1830 William De Montmorency had confirmed them by executing another deed, the draft of which had been approved by one of his solicitors, and in 1831 called upon Harvey Devereux to pay a debt due from his father which Harvey Devereux by the deed of 1830 had undertaken to pay, and in 1832 wrote a letter to Harvey Devereux approving of the deeds of 1829, and in 1833 set up the deeds of 1829 as a defence to an action for costs, which were discharged by those deeds, and succeeded in that defence, and did not com-

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plain of the deeds till 1835, when he filed his bill to set it aside ; it was held that William De Montmorency had recognized and confirmed the deed of 1829 ; and the judgment of the Court below, dismissing the bill without costs, was affirmed. *De Montmorency v. Devereux*, - - - page 64

CHAMPERTY. See *Family Arrangement*.

CREDITOR. See *Partnership—Trust Deed*.

DEMURRER. See *Discovery*.

DISCOVERY, BILL OF.

Manoel Joaquim Soares, being indorsee of certain bills of exchange, brings an action against Messrs. Glyn & Co. on the bills, as the acceptors thereof. Messrs. Glyn and Co. file a bill of discovery in aid of their defence to the action, and get an injunction in the meantime against M. J. Soares, the plaintiff at law, and the Queen of Portugal, stating that the plaintiff at law is the mere agent of the Queen of Portugal ; that he has no interest therein ; that neither of them gave any consideration for the same ; that the Queen of Portugal, by bringing the action in her agent's instead of her own name, and by attempting to appropriate to her own use the produce of the bills, commits a fraud upon the defendants. Upon a demurrer filed by the Queen of Portugal to the bill,—demurrer allowed, the Queen of Portugal not being a party to the record at law, reversing the judgment of the Court Exchequer, the Lord Chancellor, Lord Lyndhurst, and Lord Brougham concurring, Lord Wynford dissentiente. *Portugal, Queen of, v. Glyn*, - - - 253

DOMICILE. See *Legitimacy*.

EVIDENCE. See *Peerage, 1.—Partnership*.

FAMILY ARRANGEMENT.

It is not competent for a defendant failing in the defence made by his answer to set up another defence dependent upon matters of fact not put in issue by his answer, and which the plaintiff has no opportunity of disproving or explaining. Robert Persse being heir presumptive to R. P. Persse, who was then supposed to be a lunatic, and being under an apprehension that unfair means might be resorted to, in the then state of mind of R. P. Persse, to deprive the family of the succession to the estate, agrees with his eldest son, Dudley Persse, that D. Persse should sue out a commission of lunacy against R. P. Persse, and carry on such other suits and law proceedings as should be necessary, in the name of Robert Persse, at the expense of Dudley Persse ; in consideration of which agreement, and natural love and affection, R. Persse covenants, that after the death of R. P. Persse the estates which should thereupon descend to him should be conveyed to himself for life, with remainder to his son for life, with remainder to his first and other sons in tail

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FAMILY ARRANGEMENT—*continued*.

male. The son at his own expense, and in the name of his father, sued out the commission, under which R. P. Persse is found a lunatic, who soon afterwards dies; whereupon the father succeeds as heir to the lunatic's estates. Upon a bill filed by the son to carry into effect this agreement, specific performance decreed, and held, that the agreement was not voluntary, void for champerty or maintenance, or illegal, either for want of mutuality, or as being a fraud upon the great seal in lunacy; and considering the ages and situations of the parties, the father being sixty-two and the lunatic forty, and the objects to be gained by the prosecution of the commission of lunacy, that the consideration for the deed was not inadequate; but that deeds for carrying into effect family arrangements are exempt from the rules which affect other deeds, the consideration being composed partly of value and partly of love and affection. *Persse v. Persse*, - - - - - page 110

GUARDIAN. See *Receiver*.

HEIR BY DESCENT. See *Legitimacy*.

JOINTURE. See *Reference immaterial*.

JOINT STOCK COMPANY.

The London Joint Stock Bank, being a copartnership consisting of more than six persons, and carrying on the business of bankers in the city of London, agrees with a Canada bank to provide the necessary funds to pay at maturity all such bills as may be drawn by the Canada Bank upon and accepted by George Pollard, manager of the London Joint Stock Bank, to a limited extent beyond the effects in their hands, and an agreement to that effect is signed by the trustees of the company. In pursuance of this agreement the president of the Canada bank, on behalf of such bank, draws a bill of exchange, payable to the order of Francis A. Harper sixty days after sight, for the sum of 1,000*l.*, directed to George Pollard as manager of the London Joint Stock Bank, and accepted by him at the London Joint Stock Bank:—Held, eleven of the Judges being present and concurring, that, having regard to the acts in force respecting the Bank of England, the acceptance by Pollard under the above agreement was illegal; that his acceptance was equivalent to an acceptance by the Joint Stock Bank; that it was equally a violation of their privileges, whether the London Joint Stock Bank, at the time of the acceptance, had or had not funds in their hands on account of the bank in Canada, equal to the amount of the bill accepted; and that, in either case, an action on the case could be maintained by the Bank of England against the London Joint Stock Bank for a violation of the privileges conferred upon the Bank of England by the Bank Acts. *Booth v. Bank of England*, - - - - - 298

ISSUE. See *Lease*, 1.—*Patent*.

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LEASE.

1. Upon a bill filed to obtain the benefit of a perpetual renewal of a lease alleged to be contained in a lease granted in 1672, the lease itself being destroyed, the plaintiffs refer to the recitals in a subsequent lease, as containing evidence of the covenant contained in the original lease, and pray that the covenant contained in the original lease may be decreed to have been a covenant for perpetual renewal, but make no other case by that bill, the covenant so recited in the subsequent lease not being a covenant for perpetual renewal :—Held, that two issues directed by the Chancellor of Ireland, —1st, whether at the time of the execution of the original lease it was agreed that the lessor should grant to the lessee a lease, for lives renewable for ever, of the premises mentioned in the lease ; 2d, whether, independent of the memorandum or endorsement made upon the lease, there was contained in the lease any clause, covenant, or agreement, relating to the lease,—were issues not consistent with the case made by the bill. The decree was reversed, and the original bill dismissed, with costs. *Smyth v. Nangle*, - - - - page 184
2. Under a demise, “reserving all wood and underwood, timber “ and timber trees, standing, growing, or being on the demised “ premises, or at any time thereafter to stand or grow thereon, “ with full and free liberty of ingress and egress to take and “ carry away the same” :—Held, that this clause secured to the owner of the inheritance the benefit of such trees as were upon the premises at the time of the demise, but did not transfer to him the property in trees planted under the provisions of the statutes in force in Ireland respecting the planting of trees, the property therein being vested in the lessees. *Galwey v. Baker*, - - - - - 467

LEGITIMACY.

A child born in Scotland of unmarried parents domiciled in that country, and who afterwards intermarry in Scotland, though by the laws of Scotland capable of inheriting lands in that country, is not capable of inheriting lands in England. *Doe dem. Birt-whistle v. Vardill*, - - - - - 500

LIGHT.

Under 2 & 3 Will. IV. cap. 71. sects. 3. and 4. a party is entitled to maintain an action for an obstruction to the enjoyment of light and air, though the twenty years enjoyment has been obstructed by an interruption which was made for thirty-three days previous to the expiration of the twenty years. The interruption, in order to prevent an action being maintained, must be an interruption acquiesced in for one year after the party interrupted shall have had notice thereof. *Flight and others v. Thomas*, - - - - - 671

MAINTENANCE. See *Family Arrangement*.

MARRIAGE. See *Legitimacy*.

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MARRIAGE ARTICLES. See *Receiver*.

MORTGAGE. See *Trust Deed*—*Reference immaterial*.

PARTNERSHIP.

A party complaining of a decree which had directed inquiries for the purpose of obtaining further information, nine years and a half after the decree made, ought to have a strong case to induce a court to set it aside; more especially when the party complaining has exhausted the subject matter of the inquiry, and failed. Where debts due to a former partnership are agreed, upon the formation of a new partnership between a partner of the old and a new partner of the new partnership, to be transferred to the new firm as part of the capital of the new partnership, against the debts due from the old partnership, the monies received by the new partnership must, in the absence of appropriation by the customers or agreement between the parties be applied in payment of the earlier debts of the old partnership. Declarations and admissions made by plaintiff not stated in the pleadings inadmissible in evidence. *Copland v. Toulmin*, - - - - - page 164

PATENT.

A patent was taken out for new and improved machinery for spinning flax; the improvement consisted in spinning flax at a shorter reach than it had been hitherto spun, by fixing the rollers at two inches and a half distance from each other; but spinning machines having before been used for varying the distances between the rollers, according to the length of the staple or fibre to be spun, though flax had never been spun at so short a distance,—Held, that the patentee had failed in his claim to a new invention, and that his patent was void. *Kay v. Marshall*, - 682

PEERAGE.

1. Held to be a settled rule in questions of peerage, that where it is proved, after a careful search of all the depositories in which a patent of peerage would have been likely to have been found, that there is no trace of any patent, the writ of summons, and sitting in parliament by the ancestor under it, shall be evidence of the title to the peerage descending to the heirs of the body, including females.
2. During the abeyance of a barony descendible to the heirs of the body, one of the co heirs is attainted for treason; an act of parliament is afterwards passed for the restoration in blood of the children of such co-heir:—Held (after consulting the Judges) that the previous attainder of the co-heir did not effect a forfeiture of the abeyant barony, and that the Crown may determine the abeyance in favour of the descendant of such attainted co-heir. *Barony of Braye*, - - - - - 1
3. Held that the term "banneret," being added to a name in a writ, will not prevent a barony by writ being established upon the usual evidence. *Barony of Camoys*, - - - - - 34

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PEERAGE—*continued.*

4. A Summons to parliament, and a sitting under it, is evidence of a title to a peerage descending to the heirs of the body, including females; so likewise is it evidence of a similar title, where there have been several summonses both prior and subsequent to a sitting in parliament, and a sitting in parliament, though no sitting under a summons has been proved, proof being adduced that during the period of that sitting there were no writs of summons in existence. *Barony of Hastings*, - - page 621

PLEADING. See *Discovery—Family Arrangement—Commissioners of Taxes—Patent.*

POST OBIT SECURITIES.

Lord Aldborough, being tenant in tail male of certain estates expectant upon the determination of his father's life estate, charges his estates with the payment of 12,000*l.* and 20,000*l.*, in case he shall survive his father, as the consideration to Colonel Ollney for his advancement to Lord Aldborough of 6,000*l.* and 10,000*l.*, and gives an annuity to his agent for his services, which is afterwards assigned by the agent to Colonel Ollney for a valuable consideration. Upon a bill brought by Colonel Ollney to enforce, and a cross bill by Lord Aldborough to set aside, these transactions,—Held, (though at the hearing of the cause evidence was given on the part of Lord Aldborough that, according to the tables, an inadequate price was given for the post-obit securities, but no evidence of value was given by Colonel Ollney,) that the Court below, in directing the master to inquire what was the fair market price for the sums secured to be paid, having regard to the ages of Lord Aldborough and his father, the circumstances of the property, and the estate and interest of Lord Aldborough therein, and the other circumstances in the pleadings mentioned, was a proper inquiry; and that the market value, not the value of the tables, was the proper criterion of value; and it was held that Colonel Ollney had a right to be repaid, with interest, the sum he had paid for the purchase of the annuity, though the annuity was voluntary, and not supported by a pecuniary consideration. *Aldborough, Earl of, v. Trye*, - - - - - 221

POWER.

A father being tenant for life of a certain estate held upon lives, with power of appointment amongst one or more of his children, by deed of the 14th January 1804 appoints to his son, in tail male. By deed of the 18th January 1804 the father and son, in consideration of 1,600*l.*, to be applied in paying interest of debts upon the estates, and of fines due for the renewal of the lives on the estates, demise part of the estate for the lives therein named, and for lives which might afterwards be added. By lease and release of the 10th and 11th December 1807, in consideration of the debts paid by the father for the son, the son reconveys to the father the estate which had been appointed to the son:—Held, that from the circumstances of the two first

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POWER — *continued.*

deeds being executed nearly at the same time, of the father's debts being provided for out of the estate, and of the son's restoring the estate to the father, there was so much doubt as to the validity of the appointment, notwithstanding a recital in one of the deeds that the father had paid the debts of the son, as to make it necessary to inquire into the validity of the appointment.—Decree reversed, and inquiry directed. *Jackson v. Jackson*, - - - page 575

RECEIVER.

A. Forbes, having equally divided his property amongst his wife and children, directed that 400*l.* a year should be paid to his wife, for the maintenance of herself and children during her widowhood, but upon her second marriage 60*l.* a year, and that his children should be maintained out of his estate. The widow having married *Ross M'Can*, concealed her marriage, and received the 400*l.* a year: and having been appointed receiver in 1792, passed an account before the Master under the name of *Margaret Forbes*, wherein the 400*l.* per annum was allowed. *Margaret Forbes* died; and *Ross M'Can*, as administrator of her and *A. Forbes*, passed an account in 1795 before the Master, and, being appointed guardian of the children and receiver of the property of the testator, agreed with the children, who had all attained twenty-one, to refer the accounts of their father's estate to arbitration. During the pendency of the arbitration, *Catherine*, one of the daughters of the testator, by articles in contemplation of a marriage which afterwards took place between herself and *John O'Ferrall*, agreed that 1,000*l.* of her fortune should be paid to *John O'Ferrall*, and that the interest of the residue should be paid to them during their lives, and after the death of the survivor amongst their children, as they should appoint, and in default equally amongst the children. The award was afterwards made, *Catherine Forbes*, under her maiden name, having consented to enlarge the time; and several accounts were passed before the Master by *Ross M'Can*, as receiver of the testator's estate, and the proceedings carried on under the name of *Catherine Forbes*:—Held, that the accounts which were passed in 1792 and 1795 were fraudulent, to the extent of the difference between the 400*l.* and 60*l.*, although an allowance ought to be made for the maintenance of the children out of the estate of the testator; that the award and accounts passed by *Ross M'Can* were invalid against *Catherine O'Ferrall* and her children, *Ross M'Can* having a knowledge of the marriage of *Catherine Forbes* at the time the award was made and the accounts passed; and that *Ross M'Can*, as receiver and representative of *A. Forbes* and *Margaret* his widow, having paid to *John O'Ferrall* various sums in respect of which he ought to have accounted to the Court, was primarily liable, yet that the representative of *John O'Ferrall* ought to be kept before the Court in case of a deficiency of assets of *Ross M'Can* to satisfy the demands under the articles. *M'Can v. O'Ferrall and others*, - - - 593

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REFERENCE IMMATERIAL.

By marriage settlement leasehold property is conveyed to trustees, to the use of James O'Sullivan for life, and after his death to pay 100*l.* a year, by way of jointure, to his wife for her life; and subject thereto, to the use of the heirs male of their bodies; with liberty for J. O'Sullivan to raise, by deed, mortgage, or other writing, 1,000*l.*, to be applied to any purpose he should please, but not to be raised by sale of the property. J. O'Sullivan mortgages his interest in the leasehold property and the 1,000*l.* for securing a debt, and becomes bankrupt. The bankrupt's interest therein being sold upon the death of the bankrupt, the purchaser files a bill against the quasi tenant in tail, the widow of the bankrupt, and the surviving trustee of the settlement, in whom the legal estate is vested, for the purpose of raising the sum of 1,000*l.* by sale of the leasehold property:—Held, that an inquiry, directed upon the hearing of the cause, as to what was the annual value of the property and the value of the life interest of the bankrupt therein at the time of the sale, was an immaterial inquiry, and had no reference to what was to be adjudicated between the parties to the cause.

Semle, That the 1,000*l.* is a prior charge to the jointure of 100*l.* per annum. *Simpson v. O'Sullivan*, - - - page 332

RENEWAL. See *Lease*, 1.

REPLEADER. See *Commissioners of Taxes*.

RESIDUE. See *Will*.

REVOCATION. See *Will*.

SPECIFIC PERFORMANCE. See *Family Arrangements*.

STATUTE OF LIMITATIONS. See *Tithes*, 1.—*Light*.

SURETY. See *Commissioners of Taxes*.

TITHES.

1. By an agreement of 1711 between Mr. Plowden the patron and Mr. Wilson the rector of the church of Aston, the patron agreed to convey lands of the annual value of 130*l.* and to grant a rent-charge of 40*l.* a year for the benefit of the church, and the rector agreed to convey glebe lands of the value of 40*l.* a year to Mr. Plowden, and to exempt other lands belonging to Mr. Plowden from the payment of tithes of the value of 56*l.* a year. This agreement, being under a commission found beneficial to the church, was afterwards sanctioned by the ordinary, and established by a decree of the Court of Chancery, in a suit to which the patron, ordinary, proprietor, and rector were parties. From the time of the agreement all parties acted upon the faith of the agreement, except that the present rector since Michaelmas 1832 refused to receive the rent-charge, and in July 1833 filed his bill against the occupiers of those lands which had been exempted from tithes, for a common account of tithes. Mr. Plowden, the tenant for life of the lands exempted from tithes, was afterwards

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TITHES—*continued.*

made a party defendant to the bill by amendment. Upon the hearing in the Court of Exchequer the bill as against Mr. Plowden was dismissed, and as against the occupiers a decree was made for payment of tithes:—Held, upon appeal, that the bill against the occupiers be dismissed with costs, and that the rector could not come into a court of equity, and ask for the payment of tithes, without giving up the lands he received from Mr. Plowden as a compensation for his tithes.

Semble, That a person made a party to a suit by amendment after the time limited by the third section of 2 & 3 W. IV., may claim the benefit of the limitation given by the statute, though the bill was filed within the time prescribed by the statute. *Plowden v. Thorpe*, - - - - - page 42

2. "Privy tithes" synonymous with "small tithes," though the Ecclesiastical Survey makes a distinction between "privy tithes" and "lesser tithes," that distinction being explained by a subsequent terrier, distinguishing between tithes in general and privy tithes payable to the vicar; and there being evidence that in the district wherein the vicarage is situate privy tithes mean small tithes.

The endowment of a vicarage being established by ancient documents, and money payments having been made for privy tithes to the vicar since 1763 by some of the occupiers of the parish, and small tithes not having been claimed by or paid to the rector;—Held, as against a defence of the occupiers claiming in themselves, or their landlords title to the small tithes, that the vicar was entitled to small tithes of all lands in the parish in respect of which no discharge had been proved, though some portion of the small tithes had been conveyed away by the owners of the rectory, that conveyance being capable of explanation by being referred to the glebe lands belonging to the rectory, and though some payments had been made for houses only, and in some instances payments had been omitted altogether. *Clee and others v. Hall*, - - - - - 148

TREES. See *Lease*, 2.

TRUST DEED.

Sir Neal O'Donnell being tenant for life of a freehold estate, and of an estate renewable for lives, subject to a head rent (which was in arrear), and having filed a bill to prevent the execution of a judgment in ejectment brought by the head landlord for nonpayment of rent, by deeds of 9th and 10th October 1798 conveys his life estate therein to a trustee, upon trust to raise 10,000*l.* by mortgage, for payment of the arrears of rent and other incumbrances, and out of the rents, after payment of other charges, to make provision for himself and the other members of his family. On the 9th March in the same year Lord Lucan transfers certain stock to the credit of the suit, for the purpose of redeeming the estate from the arrears of rent. In the month of June 1826 the trustee under the trust deed, knowing

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TRUST DEED — *continued.*

of the advance made by Lord Lucan, writes a letter to Lord Lucan's solicitor, (antedated in February,) stating, that if any party would advance money for the arrears of rent and costs, he would consider such advance as raised by him under the power contained in the trust deeds, and would exercise the power in the best manner he could for securing the advance. During the pendency of negotiations between the trustees and Lord Lucan, for mortgaging the estate for securing the advance under the power contained in the trust deeds, Sir Neal O'Donell dies:—Held, that a bill filed by Lord Lucan against the trustee for carrying into execution the trusts of the deeds, and for charging the estates under the provisions of the deeds with the payment of his advances, could not be sustained, inasmuch as Lord Lucan, not being a party to the deeds, could not enforce their execution: Held, likewise, that the letter could not make Lord Lucan a cestuique trust under the deeds, as it purported only to give him a mortgage of the estates for the life of the tenant for life, whose death prevented the mortgage being effected. Decree below reversed. *La Touche v. Earl of Lucan*, - - page 477

TRUSTEE. See *Trust Deed*.

VICARAGE. See *Tithes*, 2.

VOLUNTARY AGREEMENT. See *Post Obit Securities—Trust Deed*.

WILL.

Mr. Charles Yorke by his will, after giving several legacies, gives the residue of his estate to trustees, in trust to pay the income to his wife for life, and after her death to transfer the residue to Sir Charles Douglas. By a codicil, after giving specific and pecuniary legacies, there is the following clause:—"All the
"rest and residue of my property not herein-before (or by my
"will or any other codicil) disposed of, I give and bequeath
"to my nephew Charles Philip Yorke, and to Sir Charles
"Eurwicke Douglas, Knight, their executors, administrators,
"and assigns, after the death of my wife, equally to be divided
"between them:"—Held, that the residue of the testator's property passed under the residuary clause of the codicil, and revoked the gift of the residue bequeathed by the will, Lord Lyndhurst and Lord Brougham concurring, the Lord Chancellor dissentiente, and being of opinion that nothing passed under the residuary clause of the codicil, the whole of the residuary property being disposed of by the will. *Earl of Hardwicke v. Sir C. E. Douglas*, - - - 555

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deeds being executed nearly at the same time, of the father's debts being provided for out of the estate, and of the son's restoring the estate to the father, there was so much doubt as to the validity of the appointment, notwithstanding a recital in one of the deeds that the father had paid the debts of the son, as to make it necessary to inquire into the validity of the appointment.—Decree reversed, and inquiry directed. *Jackson v. Jackson*, - - - page 575

RECEIVER.

A. Forbes, having equally divided his property amongst his wife and children, directed that 400*l.* a year should be paid to his wife, for the maintenance of herself and children during her widowhood, but upon her second marriage 60*l.* a year, and that his children should be maintained out of his estate. The widow having married Ross M'Can, concealed her marriage, and received the 400*l.* a year; and having been appointed receiver in 1792, passed an account before the Master under the name of Margaret Forbes, wherein the 400*l.* per annum was allowed. Margaret Forbes died; and Ross M'Can, as administrator of her and A. Forbes, passed an account in 1795 before the Master, and, being appointed guardian of the children and receiver of the property of the testator, agreed with the children, who had all attained twenty-one, to refer the accounts of their father's estate to arbitration. During the pendency of the arbitration, Catherine, one of the daughters of the testator, by articles in contemplation of a marriage which afterwards took place between herself and John O'Ferrall, agreed that 1,000*l.* of her fortune should be paid to John O'Ferrall, and that the interest of the residue should be paid to them during their lives, and after the death of the survivor amongst their children, as they should appoint, and in default equally amongst the children. The award was afterwards made, Catherine Forbes, under her maiden name, having consented to enlarge the time; and several accounts were passed before the Master by Ross M'Can, as receiver of the testator's estate, and the proceedings carried on under the name of Catherine Forbes:—Held, that the accounts which were passed in 1792 and 1795 were fraudulent, to the extent of the difference between the 400*l.* and 60*l.*, although an allowance ought to be made for the maintenance of the children out of the estate of the testator; that the award and accounts passed by Ross M'Can were invalid against Catherine O'Ferrall and her children, Ross M'Can having a knowledge of the marriage of Catherine Forbes at the time the award was made and the accounts passed; and that Ross M'Can, as receiver and representative of A. Forbes and Margaret his widow, having paid to John O'Ferrall various sums in respect of which he ought to have accounted to the Court, was primarily liable, yet that the representative of John O'Ferrall ought to be kept before the Court in case of a deficiency of assets of Ross M'Can to satisfy the demands under the articles. *M'Can v. O'Ferrall and others*, - - - 593

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REFERENCE IMMATERIAL.

By marriage settlement leasehold property is conveyed to trustees, to the use of James O'Sullivan for life, and after his death to pay 100*l.* a year, by way of jointure, to his wife for her life; and subject thereto, to the use of the heirs male of their bodies; with liberty for J. O'Sullivan to raise, by deed, mortgage, or other writing, 1,000*l.*, to be applied to any purpose he should please, but not to be raised by sale of the property. J. O'Sullivan mortgages his interest in the leasehold property and the 1,000*l.* for securing a debt, and becomes bankrupt. The bankrupt's interest therein being sold upon the death of the bankrupt, the purchaser files a bill against the quasi tenant in tail, the widow of the bankrupt, and the surviving trustee of the settlement, in whom the legal estate is vested, for the purpose of raising the sum of 1,000*l.* by sale of the leasehold property:—Held, that an inquiry, directed upon the hearing of the cause, as to what was the annual value of the property and the value of the life interest of the bankrupt therein at the time of the sale, was an immaterial inquiry, and had no reference to what was to be adjudicated between the parties to the cause.

Semble, That the 1,000*l.* is a prior charge to the jointure of 100*l.* per annum. *Simpson v. O'Sullivan*, - - - page 332

RENEWAL. See *Lease*, 1.

REPLEADER. See *Commissioners of Taxes*.

RESIDUE. See *Will*.

REVOCATION. See *Will*.

SPECIFIC PERFORMANCE. See *Family Arrangements*.

STATUTE OF LIMITATIONS. See *Tithes*, 1.—*Light*.

SURETY. See *Commissioners of Taxes*.

TITHES.

1. By an agreement of 1711 between Mr. Plowden the patron and Mr. Wilson the rector of the church of Aston, the patron agreed to convey lands of the annual value of 130*l.* and to grant a rent-charge of 40*l.* a year for the benefit of the church, and the rector agreed to convey glebe lands of the value of 40*l.* a year to Mr. Plowden, and to exempt other lands belonging to Mr. Plowden from the payment of tithes of the value of 56*l.* a year. This agreement, being under a commission found beneficial to the church, was afterwards sanctioned by the ordinary, and established by a decree of the Court of Chancery, in a suit to which the patron, ordinary, proprietor, and rector were parties. From the time of the agreement all parties acted upon the faith of the agreement, except that the present rector since Michaelmas 1832 refused to receive the rent-charge, and in July 1833 filed his bill against the occupiers of those lands which had been exempted from tithes, for a common account of tithes. Mr. Plowden, the tenant for life of the lands exempted from tithes, was afterwards

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TITHES — *continued.*

made a party defendant to the bill by amendment. Upon the hearing in the Court of Exchequer the bill as against Mr. Plowden was dismissed, and as against the occupiers a decree was made for payment of tithes:—Held, upon appeal, that the bill against the occupiers be dismissed with costs, and that the rector could not come into a court of equity, and ask for the payment of tithes, without giving up the lands he received from Mr. Plowden as a compensation for his tithes.

Semble, That a person made a party to a suit by amendment after the time limited by the third section of 2 & 3 W. IV., may claim the benefit of the limitation given by the statute, though the bill was filed within the time prescribed by the statute. *Plowden v. Thorpe*, - - - - - page 42

2. "Privy tithes" synonymous with "small tithes," though the Ecclesiastical Survey makes a distinction between "privy tithes" and "lesser tithes," that distinction being explained by a subsequent terrier, distinguishing between tithes in general and privy tithes payable to the vicar; and there being evidence that in the district wherein the vicarage is situate privy tithes mean small tithes.

The endowment of a vicarage being established by ancient documents, and money payments having been made for privy tithes to the vicar since 1763 by some of the occupiers of the parish, and small tithes not having been claimed by or paid to the rector;—Held, as against a defence of the occupiers claiming in themselves, or their landlords title to the small tithes, that the vicar was entitled to small tithes of all lands in the parish in respect of which no discharge had been proved, though some portion of the small tithes had been conveyed away by the owners of the rectory, that conveyance being capable of explanation by being referred to the glebe lands belonging to the rectory, and though some payments had been made for houses only, and in some instances payments had been omitted altogether. *Clee and others v. Hall*, - - - - - 148

TREES. See *Lease*, 2.

TRUST DEED.

Sir Neal O'Donell being tenant for life of a freehold estate, and of an estate renewable for lives, subject to a head rent (which was in arrear), and having filed a bill to prevent the execution of a judgment in ejectment brought by the head landlord for nonpayment of rent, by deeds of 9th and 10th October 1798 conveys his life estate therein to a trustee, upon trust to raise 10,000*l.* by mortgage, for payment of the arrears of rent and other incumbrances, and out of the rents, after payment of other charges, to make provision for himself and the other members of his family. On the 9th March in the same year Lord Lucan transfers certain stock to the credit of the suit, for the purpose of redeeming the estate from the arrears of rent. In the month of June 1826 the trustee under the trust deed, knowing

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TRUST DEED — *continued.*

of the advance made by Lord Lucan, writes a letter to Lord Lucan's solicitor, (antedated in February,) stating, that if any party would advance money for the arrears of rent and costs, he would consider such advance as raised by him under the power contained in the trust deeds, and would exercise the power in the best manner he could for securing the advance. During the pendency of negotiations between the trustee and Lord Lucan, for mortgaging the estate for securing the advance under the power contained in the trust deeds, Sir Neal O'Donnell dies:—Held, that a bill filed by Lord Lucan against the trustee for carrying into execution the trusts of the deeds, and for charging the estates under the provisions of the deeds with the payment of his advances, could not be sustained, inasmuch as Lord Lucan, not being a party to the deeds, could not enforce their execution: Held, likewise, that the letter could not make Lord Lucan a cestuique trust under the deeds, as it purported only to give him a mortgage of the estates for the life of the tenant for life, whose death prevented the mortgage being effected. Decree below reversed. *La Touche v. Earl of Lucan*, - - page 477

TRUSTEE. See *Trust Deed*.

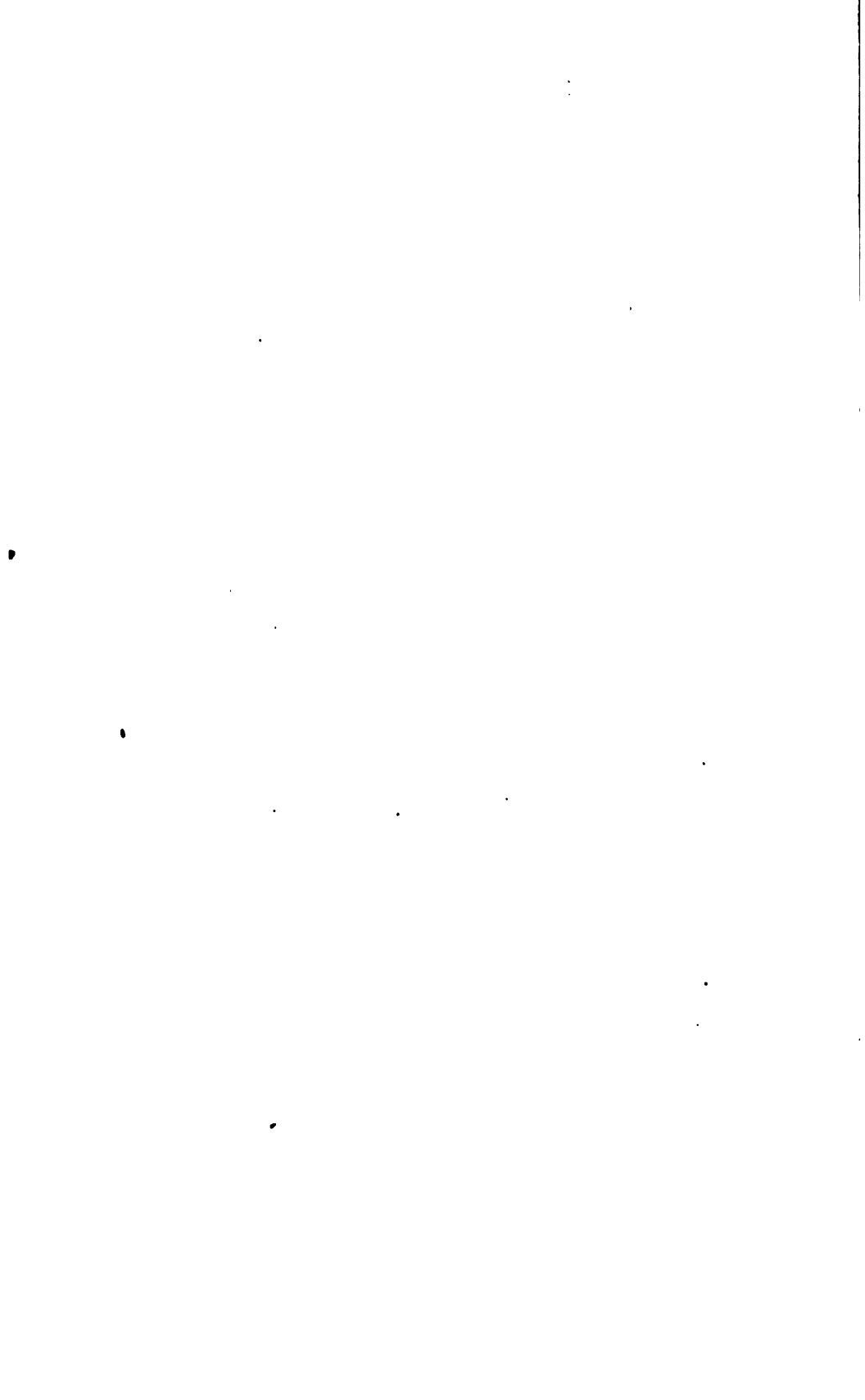
VICARAGE. See *Tithes*, 2.

VOLUNTARY AGREEMENT. See *Post Obit Securities—Trust Deed*.

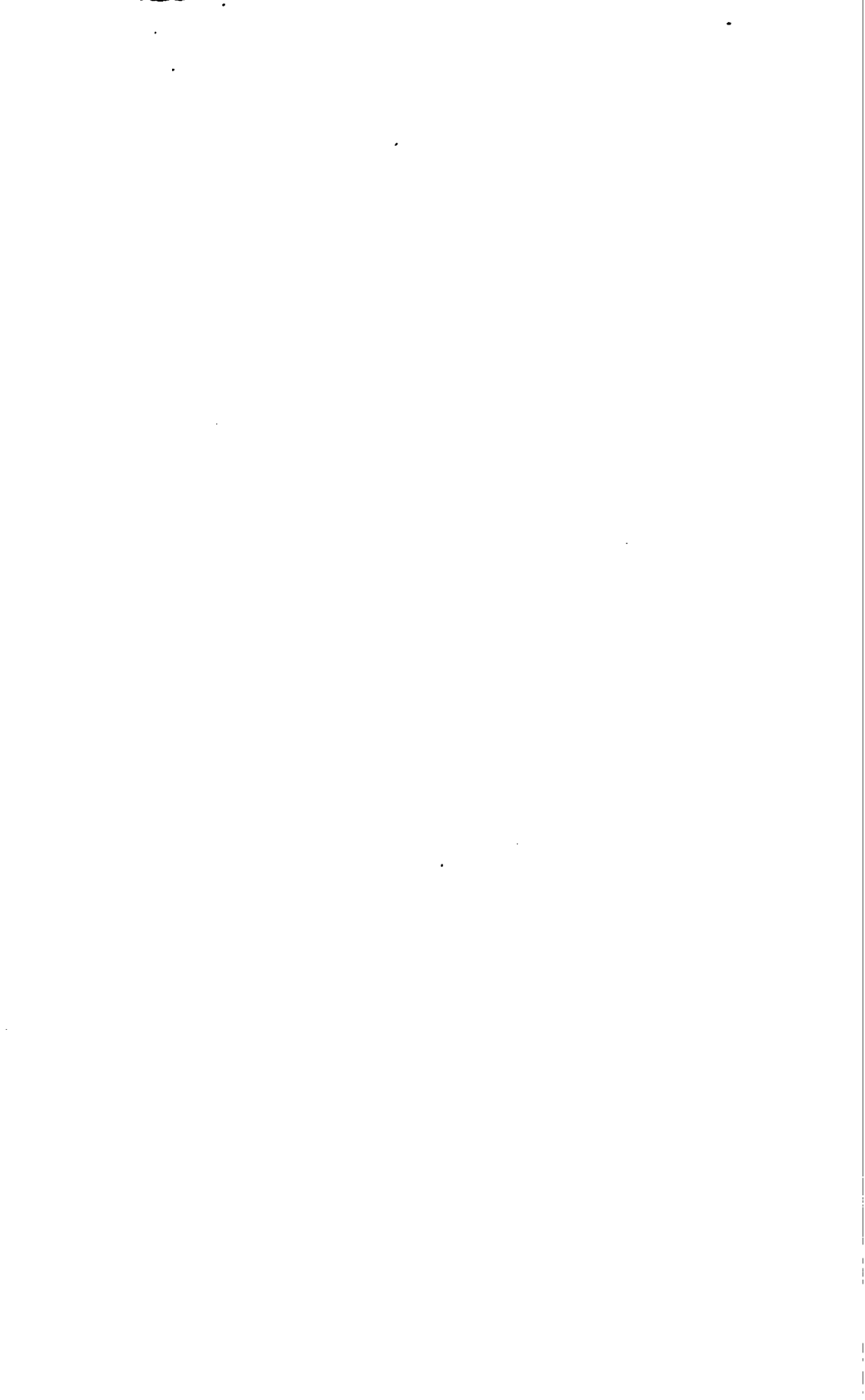
WILL.

Mr. Charles Yorke by his will, after giving several legacies, gives the residue of his estate to trustees, in trust to pay the income to his wife for life, and after her death to transfer the residue to Sir Charles Douglas. By a codicil, after giving specific and pecuniary legacies, there is the following clause:—"All the rest and residue of my property not herein-before (or by my will or any other codicil) disposed of, I give and bequeath to my nephew Charles Philip Yorke, and to Sir Charles Eurwicke Douglas, Knight, their executors, administrators, and assigns, after the death of my wife, equally to be divided between them:"—Held, that the residue of the testator's property passed under the residuary clause of the codicil, and revoked the gift of the residue bequeathed by the will, Lord Lyndhurst and Lord Brougham concurring, the Lord Chancellor dissentiente, and being of opinion that nothing passed under the residuary clause of the codicil, the whole of the residuary property being disposed of by the will. *Earl of Hardwicke v. Sir C. E. Douglas*, - - - 555

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Printed by A. SPOTTISWOOD,
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